United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7428

In The

United States Court of Appeals

For The Second Circuit

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM,

Plaintiffs-Appellants,

-against-

EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F.I. duPONT GLORE FORGAN & CO. and duPONT GLORE FORGAN INCORPORATED,

Defendants,

(Continued on Reverse)

UNITED STATES COURT OF APPEALS
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and

HASKINS & SELLS and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants-Appellees.

On Appeal from an Order of the United States District Court for the Southern District of New York.

PAGINATION AS IN ORIGINAL COPY

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long meeting so there mus have been more detail.

Q Did the negotiating committee of Kohns, Mundheim and Fraiman, make a recommendation to the Hirsch partnership with respect to going ahead with the merger or not going ahead?

A I believe we did.

Q What was the recommendation?

A To go ahead.

Q Did you give any rational to support the recommendation?

A I don't recall.

Q Was the recommendation oral?

A Yes.

Q Do you recall pointing out any negative aspects about the merger to the Hirsch partners?

A No.

Q Do you recall pointing out any positive aspects?

A What were the first words?

Q Do you recall pointing out to the Hirsch partners when you made this recommendation any positive aspects?

A I don't recall the fact that we recommended going ahead with it.

Q Is the phrase "lock, stock and barrel transaction" familiar to you?

A Yes.

Q Will you tell me in what respect it is familiar to you?

A A typical example of what it was was the revenue properties. They suggested that they not take over Hirsch & Company, Inc., which was involved in the revenue properties, and leave that to us to liquidate, and we tried to indicate you are going to take all our liabilities or there will be no deal, and that is what we meant by lock, stock and barrel.

Q If I understand you correctly, this was the concept that the Hirsch partnership had which must apply to the merger or there would be no deal, is that correct?

A That is correct.

Q And that essentially it included the duPont firm assuming all liabilities of the Hirsch firm, is that correct?

A That is my recollection, yes. I would rather have a lawyer answer the question, but as a layman, yes.

Q Is it your understanding that the deal as reflected in Plaintiffs' Exhibit 1, the merger contract, that is before you, incorporated that principle in it?

A I would presume so, yes.

Q Do you recall how the Hirsch partners that

elected to join the merger were to participate in the duPont profits, if any? The profits of the merged firm, if any?

A The details of their participation?

Q Yes.

A Offhand, I don't.

Q What about salaries? Do you recall any salaries being agreed to for the Hirsch partners who went with the merged firm?

A I recall that there was agreement on salaries, but the salaries themselves I wouldn't want to answer. I mean I don't remember.

Q Do you recall if all the Hirsch partners who went into the merged firm were going to get salaries?

A I don't recall.

Q Do you recall that youwere going to get a salary?

A What is worrying me is I know I got a drawing account. Whether it was charged to my capital account as it had been at Hirsch or whether it was a salary I frankly don't remember.

Q Mr. Kohns, wasn't it--

A I thinkit was a salary.

Q About $36,000 a year, wasn't it?

A That was the amount, yes.

Q At Hirsch you hadn't had a salary, had you?

A No.

Q Simply a draw against earnings, isn't that correct?

A A draw against capital.

Q Right. Charged to your capital account?

A Yes, sir.

Q What kind of retirement plan did you have at Hirsch & Company?

A None.

Q Do you recall whether you were going to have a retirement provision in the merged firm?

A Yes.

Q Do you recall whether anybody else was?

A Yes.

Q Who else?

A Mr. Hirsch and Mr. Mundheim.

Q Anybody else?

A No.

Q Do you recall whether Mr. Mundheim was going to have a salary of $36,000 a year as well?

A I believe so, yes.

Q Anybody else who came over from Hirsch?

A I really don't remember.

Q Do you recall any other emolument that was specifically reserved for Messrs. Kohns, Hirsch and Mundheim in the merged firm that is not available to Ny other Hirsch partners?

A Yes.

Q What is that?

A There was a provision made that should the partnership incorporate that we had certain rights to buy stock at a -- I think it was at book value. That was not limited to us. We had the right to pass some of it onto some others. It was a complicated deal.

Q Well -

A Basically, it was the three of us to start with any way.

Q Did you also have a right to tkeep it all for yoruselves?

A Yes, I believe so.

Q Do you recall anything else that was specifically reserved for you three, was not shared in by any of the Hiarch partners who joined the merged firm?

A I don't know.

Q Would you see if you could find Stock Exchange Exhibit I in your pile, sir, which is a one-page letter dated July 2, 1970.

(Pause.)

A Yes.

Q Do you have that?

A Yes.

Q Can you identify it for me, sir?

A Yes. As part of the negotiations duPont made available to the Hirsch partners a certain percentage of duPont's profits and losses as general partners, the percentage being directly connected with the capital brought in. This is the distribution of the percengages we chose to take as general partners. I find a little difficulty in that statement because Mr. Howard Hirsch was not a general partner, and he has a percentage of the profit here.

Q Was this a 2.5 per cent of the profits that were allocated to you three to divide up amongst yourselves as you saw fit?

A Well, this letter divides up 2-1/2 per cent, but as I say we were given -- Hirsch as a whole was given the opportunity to have a substantially greater percentage.

Q Why does this letter only speak to you three gentlemen, though, as opposed to all the other Hirsch partners?

A I don't know.

Q Paragraph C of Exhibit 1, Mr. Kohns, speaks of

additional capital payments being payable in the amount of 2.5 per cent of the net profits of the duPont firm only to Messrs. Hirsch, Kohns and Mundheim as long as their limited partnership remains part of the firm. There was no one else besides you three who received that additional capital payment, was there?

A Not immediately, no.

Q Ever?

A Yes.

Q When did somebody else get a part of it?

A In the event of the total withdrawal of limited capital by any --

MR. CAMHY: Your Honor, I object. It is apparent Mr. Brooks is asking Mr. Kohns to interpret the agreement. I stood by while Mr. Kohns was asked for this recollection but once we get into what is in the agreement it seems to me Mr. Kohns is no better or worse a witness than the agreement itself. I don't know that is as good.

MR. BROOKS: I understood to be asking Mr. Kohns a question of fact, when somebody else got some of this allocation that Exhibit I seems to divide up only among the three plaintiffs. It is a matter of fact.

THE COURT: Mr. Kohns, did you understand it was to be divided amongst somebody else?

THE WITNESS: There is provision for other people under cert ain circumstances getting part of it, yes.

MR. CAMHY: Your Honor, is that from what he is reading or from what he knows? He apparently seems to be reading something, and I suggest if that is his conclusion from what he is reading that ought to be clear.

THE COURT: Is that correct? You are taking that from reading the document?

THE WITNESS: Yes.

MR. CAMHY: I suggest Mr. Brooks may read better than Mr. K s in this respect.

THE COURT: I see what you are referring to.

THE WITNESS: At the bottom of thepage, your Honor.

THE COURT: Yes.

Q Mr. Kohns, Exhibit I allocates that 2.5 per cent among the three plaintiffs; isn't that correct?

A Yes.

Q Was there ever an allocation of that 2.5 per cent to anyone else?

A No.

THE COURT: I think this is a good point to adjourn for lunch.

MR. BROOKS: May I offer Exhibit I before we do

so, your Honor?

THE COURT: Yes.

Do you have any objection?

MR. CAMHY: No objection.

THE COURT: All right.

xx (Defendant New York Stock Exchange Exhibit I was received in evidence.)

THE COURT: We will adjourn until 2 o'clock.

(Luncheon recess.)

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AFTERNOON SESSION

2:00 p.m.

P A U L L. K O H N S, resumed.

CROSS EXAMINATION (Continued)

BY MR. BROOKS:

Q Mr. Kohns, you referred to the Revenue Properties matter in your direct testimony.

Can you give us a little more detail about that matter in connection with the merger agreement with duPont?

A I was asked wehther there was anything that, any liabilities that they should know about that I had not already disclosed, and I said, yes, there were two.

One was that our chief accountant had been with us for over 50 years and I promised him a 2-year severance pay and I would not allow duPont to assume that, that Hirsch was going to pay that.

And the other matter was a class action suit against revenue properties which was an underwriting of which we shared a rather small percentage. But there was also some after trading if that phrase is familiar to you. So that the liabilities were not limited to our percentage of potential liabilities, our percentage of the underwriting, but also because of the condition of Wall

Street, houses were going out of business and failing and our percentage might have to assume some of the additional percentages. So they said, well, why don't you keep Hirsch & Company, Incorporated, which was our underwriting differentiation and then this lawsuit will be your responsibility, and that is whee the expression lock, stock and barrel came into the discussion that we would not go through with it unless they assumed that liability. They said all right, we will assume it for a price. And there was a discussion as to the price and we broke up into the partners and attorneys for each firm into the separate rooms and we had three attorneys there and none of them could give me any statement of what they thought our financial liability was in the matter. Largely I suppose because of the after trading. In any case, it was agreed that they would come back with a rather high offer and therefore we should give a low bid with the firm expectation that it would be split in two, which was exactly what happened.

Q And what was --

A That split in two was reduced later by the fact that there was a tax allowance on the thing approved to them. And that is the story.

Q Do you recall Mr. Norman's testimony where he said

the originally agreed amount was $175,000 and it was subsequently reduced to 136 because --

A That's the tax aspect that I was referring to.

Q Does that accord with your recollection?

A Yes.

Q Tell me, did Haskins & Sells reflect the contingent liability in respect to evenue roperties in their audited financial statement of the firm as of April 26, 1970?

A I don't recall.

Q Was there any insurance for the underwriters?

A Yes.

Q Was there any agreement of indemnity to the underwriters?

A I don't recall.

Q Have you ever been subject to criticism from other Hirsch partners for the amount which you agreed upon to reflect the Revenue Properties liability in the duPont negotiations?

A Yes.

Q In the course of their expression of their dissatisfaction did they or their representatives claim that this contract, that is Plaintiffs' Exhibit 1, was a sweetheart contract in favor of Messrs. Mundheim, Kohns and Hirsch?

A It never came to arbitration or court proceedings,

so that I don't know that the question was raised.

Q Are you familiar with a proceeding captioned " Paul Kohns, et al. v. Seymour Katzenstein and Maurice Meyer, Jr., v. Paul Kohns et all.?

A Not by that caption, no.

Q Are you familiar with a proceeding involving those gentlemen and yourself, Mr. Mundheim, Mr. Hirsch?

A If you will be more specific I would find it easier to answer. It must make a reference to some facts.

Q Well, are there more than one proceedings?

A I am sorry?

Q Is there more than one proceeding involved --

A Over a period of 40 years, yes.

Q How about one that was going on in 1974 at least? In which Mr. Meyer claimed that you entered a sweetheart contract with duPont when you signed that merger agreement to the prejudice of the other Hirsch partners who didn't go along and to whom was charged the amount that you agreed to reflect the revenue properties contingent liabilities?

A Mr. Meyer did sue us regarding the Revenue Properties agreements. I do not recall the sweetheart phase of it.

Q How about other Hirsch partners like Gil Bach did they sue or bring an arbitration proceeding supporting the same claims?

A To the best of my recollection it was only Maurice Meyer that sued.

Q Did any other partner bring an arbitration proceeding?

A No, we brought arbitration proceedings against them.

Q I see. In the course of those arbitration proceedings did you ever hear the term used "sweetheart contract"?

A I do not recall it, no.

Q Did you attend the hearings in those arbitration proceedings?

A There were no arbitration proceedings.

Q Did you attend proceedings before arbitrators selected under the New York Stock Exchange Arbitration Provisons?

A I am sorry, there were arbitration proceedings. Yes, there were two meetings. I did attend, yes.

Q Weren't there four, at least four hearings?

A I remember two only. But if the evidence shows four I wouldn't --

Q Well, sir, I have here the transcript of the proceeding on May 6, 1974 at which you are indicated as present along with Mr. Hirsch and Mr. Mundheim in which Mr. Greenwald, who has introduced himself as Mr. Gilbert Bock's attorney, said the following, and I want to see if it refreshes

your recollection about the term "sweetheart contract." This is on page 48 of that transcript "We will show that the deal with duPont was negotiated to suit the personal interest of Messrs. Mundheim, Kohns and Hirsch rather than all the partners and that's already I think been indicated here to some extent."

" The sweetheart contract have already been discussed."

Do you recall Mr. Greenwald making that presentation to the arbitrators?

MR. CAMHY: That is pretty fragmented, your Yonor.

THE COURT: I am not going to allow -- I think this is getting fair afield. I do think that the fact that some of the partners may have made these accusations is something that I will consdier as to the intent of plaintiffs, but I am not going to go into any details with regard to this matter. We are not going to have a second trial here.

Q Mr. Kohns, when did you sign Plaintiffs' Exhibit 1, the merger contract?

A If you will tell me what day of the week July 2nd, 1970 was I will find it easy to answer you.

Q Did you sign on July 2nd?

A No, I am not sure it wasn't signed a day or so before

that.

Q I am afraid I can't help you with what day of the week --

A Well, very close to July 2nd if not July 2nd.

Q Where were you when you signed?

A In my office.

Q Who else was present?

A With possibly one or two exceptions, every partner who was a party to the agreement.

Q How many partners did not elect to become a party to the agreement?

A Oh, I can't tell you. I could tell you by looking up records but I can't offhand.

Q A significant number? More than two or three.

A There were two or three general and a number of limited. Yes, a significant number.

Q Before you signed did you read the contract?

A Mr. Rist read it to the group assembled for that purpose.

Q Aloud?

A Yes. Or maybe it was Mr. Taikovsky, his partner. But he and Mr. Taikovsky were then present.

Q Did you then sign?

A Yes.

Q After the reading?

A Yes.

Q Now, up to this time had you had any communications, oral or written, were any officer or employee or governor of the New York Stock Exchange in respect to the proposed duPont merger omitting Mr. Framen who was a member of the negotiating committee?

A No.

THE COURT: What was that last phrase about Mr. Framen?

MR. BROOKS: Omitting Mr. Framen who was a member of the negotiating committee and also a governor of the exchange.

THE COURT: All right.

Q Mr.Kohns, would you see if you can find Exhibit JJ in the pile of documents? It is a latter dated June 15, 1970 which seems to bear your signature. Why don't you take mine, sir (handing). Can you identify Exhibit JJ?

A Yes.

Q Is that your signature?

A Yes.

Q Did you send a copy of Exhibit JJ to all the Hirsch partners who were going to participate in the merger?

A Yes.

Q Was there included with the first page of Exhibit JJ, a form as it attached to Exhibit JJ?

A Yes.

Q Can you tell me whether you recognize the handwriting on the form attached to Exhibit JJ?

A It is a dreadful copy and the signature doesn't come through. There is no signature.

Q Well, I was asking whether you could identify the handwriting, whether there is a signature or not. Perhaps we could produce the Court's copy of Exhibit JJ.

A It is a dreadful copy. No, I can't.

Q Do you recall identifying that handwriting on your deposition, sir? This might be a little better copy (handing).

A What was your question?

Q The last question was, do you recall identifying that handwriting during the course of your deposition in this lawsuit? Does it look like Mr. Hirsch's handwriting?

A It is so dreadfully faint it is terribly diffiuclt to --

MR. GILLESPIE: If your Honor please, we have the original from which that was made(handing).

Q Let me show you the original from which the copy was made, sir (handing).

A Yes. That looks like Mr. Hirsch's handwriting.

Q Thank you.

Tell me, did you keep forms such as those attached to Exhibit JJ in the office of Hirsch & Company?

A Yes.

Tlb

Q For what purpose?

A For the use of incoming new partners.

MR. CAMHY: I object to the use of the words "such as that" and move to strike the testimony. As your Honor will see this will become quite important "such as that." Do you mean such as that or do you mean in that form, Mr. Brooks?

MR. BROOKS: Well, I mean forms such as is part of Exhibit JJ, of course, without the penciled handwriting on it.

THE COURT: You don't mean such as, you mean did he keep these forms.

MR. BROOKS: Yes, sir.

MR. CAMHY: That form.

Q And I understand you did, sir.

A I kept forms which had been signed by incoming partners. Whether the form had been changed from the time they went into my files to the time of the form you have in your hand I don't know.

Q Well, I am not asking you whether they were changed over the years, sir. I am just asking whether you had at the time a bunch of these forms around that you dipped into to send some out to those partners who were going to go along with the deal.

A I can't answer you.

Q You can't.

A No.

Q Didn't you answer me on your deposition?

A If that form was changed a week before I sent them out the answer is no. If the form was unchanged for three or four years the answer is yes.

Q Mr. Kohns, that exhibit which has been shown to you now as Stock Exchange Exhibit JJ was Exhibit HHH on your deposition. At page 162 of the transcript I put the following question to you about that exhibit and you gave the following answer:

"Q Did you keep some of those forms on the premises for people who came to decide that they wanted to make an investment in Hirsch & Company so that the forms would be available?

"A Yes."

Now does that refresh your recollection whether you kept forms such as Exhibit JJ on the premises?

MR. CAMEY: Again, same objection, your Honor.

THE COURT: Well, I thought, Mr. Brooks, that he had answered yes that he did keep the forms on the premises.

MR. BROOKS: If that is understood by the court

I will proceed. I thought he was trying to qualify it, your Honor, that's why I was pointing out that when his deposition was taken there was no qualification.

THE COURT: Well, I think the only qualification I understood is he is not sure that this is the form that he kept -- this is the precise form, I gather that's what the qualification is that was sent out --

THE WITNESS: You are right, your Honor.

THE COURT: -- on June 16th, I gather that's what the qualification was.

MR. BROOKS: Your Honor, I offer Exhibit JJ in evidence.

THE COURT: Do you have any objection to that?

MR. CAMHY: Yes, your Honor. I object.

THE COURT: What is your objection?

MR. CAMHY: There's been no showing, I think, where this came from.

THE COURT: Well, the showing --

MR. CAMHY: Mr. Kohns recollects his letter but the question is that this form which apparently is in Mr. Hirsch's handwriting, how it got attached to the letter I don't think is --

THE COURT: Well, is the issue whether it is Mr. Hirsch's handwriting or is the issue that this form that's

attached to Exhibit JJ was in fact sent out with this letter by Mr. Kohns?

MR. BROOKS: Well, I hope to establish both points, your Honor. When that was produced to us it was represented that it came from the files of one of the three plaintiffs and it was attached as it is now, and at Mr. Cohen's deposition he was questioned on it and he answered the questions that were put to him similarly as he did today set qualifications which I last interrogated him on. Now I am offering in evidence the exhibit.

MR. CAMHY: Your Honor, we don't know how it came to be attached. It was found attached in the files. If it was delivered attached then it was found attached in the files. Secondly I don't know, or -- I don't know that the evidence will show that it was attached that this was the form sent out but I assume that it was. It is just that I don't know that these two were ever connected together. I don't think -- I don't really dispute or I don't think Mr. Kohns will, that this form was sent out over his letterhead and if that is the only issue, I don't think we will have any problem and I don't object. The question of whether this was attached or not I don't know.

THE COURT: Well, Mr. Camhy, that explanation has wasted about four minutes. The objection is overruled.

(Defendant New York Stock Exchange Exhibit JJ received in evidence.)

BY MR. BROOKS:

Q Now, Mr. Kohns, you yourself signed a form similar to that attached to Exhibit JJ, did you not?

A Yes.

Q Try to locate that in the file of exhibits. It is designated KK.

THE COURT: I hope, Mr. Brooks, that what is on the form is of no significance because I can't read it.

MR. BROOKS: What is on Mr. Kohns' form your Honor, I think can be read and is of significance.

THE COURT: All right.

Q Have you found KK, Mr. Kohns?

A Yes, sir.

Q Is that filled out in your handwriting?

A Yes, sir.

Q Turn to the last page and you will see that it is sworn to before a notary by you and signed on or about July 1, 1970, is that in accordance with your recollection?

MR. CAMHY: Objection.

THE COURT: What is the objection?

MR. CAMHY: Would you point out where it is

sworn to, Mr. Brooks?

THE COURT: It is sworn to--

MR. BROOKS: Before the notary stamp.

THE COURT: The notary stamp is on the last page.

MR. CAMHY: I don't see where it says it is sworn to. I'm sorry. It seems to be an acknowledgment. I don't see any oath or swearing. Would you point it out? Maybe I am just not looking at the right place.

MR. BROOKS: I don't see the word "sworn" there, Mr. Camhy. Does that make a difference to you?

MR. CAMHY: It appears to be an acknowledgment. Yes, it says before me personally came Paul Kohns who told me that he signed this which is --

MR. BROOKS: Well, whatever it says I will retreat to your Honor.

MR. CAMHY: Thank you.

Q Is it in accord with your recollection, Mr. Kohns, that you did sign it and that you did appear before the notary indicated on or about July 1st and so acknowledged?

A Yes.

Q And at the time you signed this Mr. Kohns, did you understand that it was a written submission to the New York Stock Exchange in connection with your entry

into the duPont firm as a general partner and limited partner?

A Yes.

Q Did you understand that any misstatement that you made in this form would be grounds for the stock exchange to void the agreement and to withdraw the approval that it would give to you to become a partner of the duPont firm?

A I am not at all sure that I was aware of that.

Q Well, take a look on the last page at the paragraph which has the number 3 to the left, that says "Made any misstatements to the exchange." Do you see that there, sir?

A Yes. It says "may be withdrawn."

Q That's right.

A I believe you said would be.

Q With the correction did you understand that at the time you signed it?

A For 40 years --

Q Mr. Kohns, I belive you can answer me yes or no.

A It was not in my mind.

Q Did you read the agreement before you signed it?

A Part of it.

Q Just part of it?

A Yes.

Q Did you read that part that we are focusing on

where it says "made any misstatements to the exchange"?

A No.

Q Mr. Kohns, were you aware at the time you signed this that if you did make a misstatement to the exchange in this application it would be grounds for the exchange's Board of Governors for suspending or expelling you as an allied member of the exchange?

A No.

Q You didn't know that?

A No.

Q Doesn't this agreement certify that you are familiar with the stock exchange constitution and rules on the day you signed?

A What was the question?

Q Doesn't this agreement certify that you were familiar with the stock exchange constitution and rules on the day you signed the agreement?

A Yes.

Q Let me show you --

THE COURT: When you use the word agreement you are referring to this -- you have got me confused-- are you referring to this when you use the word agreement?

MR. BROOKS: Yes.

THE COURT: I was wondering whether you were

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referring to Plaintiffs' Exhibit No. 1.

MR. BROOKS: No, I'm sorry. The exhibit you have before you, your Honor.

THE COURT: All right.

Q Mr. Kohns, let me show you Exhibit KK -- one which you have before you but I will lend you my copy. (handing)

Were you familiar with that provision of the constitution of the New York Stock Exchange when you signed the agreement to become an allied member and a partner in the duPont firm and submitted it to the exchange?

A No.

Q You were not?

A No.

Q As a member of the stock exchange community for 45 years did you ever gain any understanding of the penalty for making misstatements to the exchange?

A I had no occasion to.

Q Did you understand that it was a serious matter that representations by a member or allied member to the exchange be true and accurate?

A I understood that about any statements made to anyone.

Q Did you understand that it was particularly true

with respect to a New York Stock Exchange member or allied member?

A No.

Q Did you understand that the principle of self-regulation in the securities industry depended upon accurate and truthful representations by members and allied members of national securities exchanges?

MR. CAMHY: I object.

THE COURT: Well, I think I will sustain the objection. The chief thing is did he understand the penalty.

Q Mr. Kohns, you have told me you read part of this agreement and you didn't read other parts. Would you tell me what parts you read and what parts you didn't read?

A To my best recollection I read the parts that I had to read in order to fill in the blanks.

Q Would you take a look at the fourth page of the exhibit, sir, where there is a box headed "Important" on the top of it?

A Yes.

Q Did you read the material in that box headed "Important"?

A Enough to fill in the blanks.

Q What do you mean by that?

A Well, there is a blank under the words latest

certified audit by blank. I couldn't fill in the blanks without having read the few words preceding it.

Q Is that all you read in that box headed "Important"

A Yes.

Q Are those blanks filled in accurately and truthfully?

A Yes.

Q So I take it you did see the certified audit by Haskins & Sells dated September 28, 1969, before you signed this exhibit?

A No, that's my handwriting.

Q I know it is your handwriting, sir, but I am asking you whether it is a truthful statement.

A Yes.

Q How about the net capital computation prepared by the member organization dated June 19, 1970, was that a truthful representation that you did see such a statement, such a computation?

A Yes.

Q Now I take it after you read the few words surrounding those blanks you passed right on and went on to the next blank, is that correct?

A Yes.

Q You didn't read anything else in that box

entitled "Important"?

A No.

Q Mr. Kohns, in your 45 years on the street and in the time you were at the Hirsch firm filling out all these reports to regulatory institutions have you ever seen a box like that with a big heading on it that said "Important" before?

A Not to my recollection, no.

Q This was a little unusual, wasn't it?

A Yes.

Q You passed it right on by after you filled in those blanks, is that right?

A Yes.

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T2a

Q Mr. Kohns, how soon after the merger became effective did you begin to have some concern about whether you had made a wise investment by becoming a member of the duPont firm?

A When I became aware of constant pressure from the New York Stock Exchange for additional capital.

Q How soon was that?

A Probably the month of September.

Q Would you take a look at Exhibit K which is in front of you, sir, which is a letter dated July 10, 1970?

MR. BROOKS: Your Honor, which Mr. Kohns is looking at that I have been reminded that I neglected to offer Exhibit KK in evidence and I do so now.

MR. CAMHY: No objection, your Honor.

(Defendant New York Stock Exchange Exhibit KK received in evidence.)

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Q Mr. Kohns, to assist you the first page of Exhibit K is the original somewhat illegible copy which I have retyped and that is the second page. It may assist you to read the second page, I am sure your counsel will verify that they are accurate.

A What was your question, sir?

Q I haven't really put one yet. Do you recall seeing Exhibit K shortly after July 10, 1970?

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A No.

Q Were you a member of the finance committee of the merged firm which went under the name of F.I. duPont, Glore, Forgan & Co.?

A Yes.

Q Do you recall signing a reply to the July 10th letter which is Exhibit K?

A I do not recall.

Q Would you try to find Exhibit L on the table in front of you and see if looking at that refreshes your recollection?

A Exhibit L seems to be something entirely different.

Q Let me show you a copy of Exhibit L (handing). Does Exhibit L contain your signature, sir?

A It does.

Q Does looking at it refresh your recollection that you saw Exhibit K shortly after July 10, 1970?

A It indicates I must have seen it. It doesn't refresh my memory as to having seen it.

Q Would you as a matter of practice have signed Exhibit L which refers to Exhibit K had you not seen Exhibit K?

A No.

MR. BROOKS: I offer Exhibit K and Exhibit L

your Honor.

MR. CAMEY: No objection.

(Defendant New York Stock Exchange Exhibits K and L received in evidence.)

Q Do these two exhibits refresh your recollection on when you learned that you might not have made a wise investment in investing in duPont, Glore, Forgan Co.?

A I really don't think so, no.

THE COURT: I didn't hear the answer.

THE WITNESS: I really do not think so, your Honor, no.

Q Did you have a discussion with Mr. Forgan some time in midsummer of 1970 about being duped?

THE COURT: I amhaving difficulty. What was the last--

MR. BROOKS: About being duped.

A Yes.

Q When did that conversation take place? At about the time of these two exhibits, K and L?

A No, I think it was substantially later.

Q Later. Tell us about that conversation. What did you say to Mr. Forgan and what did he say to you?

A I can't remember the substance of the conversation.

Q Was the essence of that, we have been misled in

investing in this firm?

A Yes.

Q What did you do about it?

A Well, we even had some discussion as to whether several of the senior partners of the former Glore, Forgan firm and of the Hirsch firm could split apart and form their own firm.

Q Did you discuss the matter with your counsel?

A No.

Q What did you determine about splitting apart?

A That it was impracticable.

Q Do you know whether the finance committee generated any more capital in response to Exhibits K and L?

A I believe it did.

Q Under the contract, Plaintiffs' Exhibit 1, you had the right to withdraw from the merged firm in six months, did you not?

A Yes.

Q Did you give notice to withdraw as provided in the contract?

A Yes.

Q Did you subsequently rescind that notice and elect to continue as a capital contributor?

MR. CAMHY: Your Honor, I think he is characterizing

it legally. I don't mind if he just says did you elect to leave your money in the firm in slme refinanced way, but when he uses rescind and the phrase that he used I think that that's a little bit too artistic. I don't think it was quite that way. And I am not arguing in substance. I object to the form of the question.

THE COURT: I have no way of knowing what is the proper--

MR. BROOKS: I will adopt Mr. Camhy's question.

Q Do you recall Mr. Camhy's question, Mr. Kohns?

A Yes, whether I left substantially my money in in some form.

Q Yes, did you?

A The answer is yes.

Q What was the form in which you left it in?

A As a subordinated lender.

Q In that form was it subject to attrition by operating losses of the firm?

MR. CAMHY: Your Honor, I object. That question was the subject of a massive litigation -- not a massive but a substantial litigation and it was left unresolved by that litigation.

THE COURT: Well, I think that whatever the conditions that reinvested or whatever you want to call it, I

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think is of some importance, at least to me and I would-- I don't know how you want to go into it, Mr. Brooks, but I don't want to go into it too deeply but I would just like to know the terms and conditions pursuant to which they were left in if that can be described to me with some accuracy.

MR. CAMHY: Mr. Brooks, would you object if I stated to his Honor my--

MR. BROOKS: Yes, I would.

MR. CAMHY: You would. All right. Well, your Honor, the instruments are available and if it is going to be that why don't we have the instruments? Because the instruments as I say were the subject of a litigation in which a judge sat for six months on that question and ended up not deciding it.

MR. BROOKS: Your Honor, we do have an instrument--

THE COURT: I don't want to have something I am going to have to take six months to decide.

MR. BROOKS: That's what I was trying to establish. We don't have the key instrument which is Mr. Kohns' subordination agreement. I don't think that it's ever been produced. We have it for the other plaintiffs I believe but we do not have it for Mr. Kohns. We do have an instrument by which the Hirsch partners--

THE COURT: Well, can we solve that by your merely filing that? That will give me some idea anyway. I think that will be sufficient.

Q Mr. Kohns, do you have before you Exhibit N?

A N for neutral?

Q Yes.

MR. CAMHY: Your Honor, I don't wish to over-complicate this but when the matter did come up it was made clear that it was not simply one instrument but two or three instruments that had to be looked at togehter. I will have no objection to Mr. Brooks pursuing it one instrument at a time but I wouldn't want your Honor to think it was as simple as just looking at an instrument.

MR. BROOKS: Your Honor, what I propose to do is get identified and into evidence Exhibit N, then Mr. Camhy can add whatever exhibits he thinks should be added.

THE COURT: All right.

Q Does Exhibit N contain your signature, Mr. Kohns?

A Yes.

Q Is it the agreement by which you withdrew your notice to withdraw your capital from the duPont firm and agreed to keep it in a subordinated form on and after January 1, 1971?

A I would really like to take ten minutes to read

this before answering your question.

Q Well, sir, would it make you feel any more secure if I told you you identified it in your deposition and it was marked there as Exhibit JJ as it shows?

MR. CAMHY: Mr. Brooks, it would make him more secure if you told him these were verified by us. Were these given to you by us?

MR. BROOKS: Yes, sir.

MR. CAMHY: Mr. Kohns, if that's the source then to the best of our ability to verify it--

A My answer is yes.

MR. BROOKS: I offer Exhibit N in evidence.

MR. CAMHY: No objection.

(Defendant New York Stock Exchange Exhibit N received in evidence.)

Q Mr. Kohns, were there some Hirsch partners that entered into the merged firm and subsequently withdrew before the end of 1970?

A At the end of 1970, yes.

Q There were some?

A At the end of 1970, yes.

Q Mr. Kohns, did those partners who withdrew at the end of 1970 withdraw with them the capital which they contributed?

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A I believe so.

Q Mr. Kohns, your counsel has produced for us what appears to be your 1971 income tax return which refers to the lost investment in the duPont firm. Let me see if this is a signed copy. yes, I believe it is. Let me call your attention to your signature on the third page of the 1040 form (handing). Is that your signature, sir?

A Yes.

MR. BROOKS: Your Honor, I offer this for the information that it affords the court on the year in which the loss of the investment here at issue is claimed and the nature of the loss as described in the income tax return.

MR. CAMHY: Your Honor, will you take it subject to legal argument of relevancy rather than an objection? I don't really want to object to it but I do want to argue what its probative force is and what relevancy it has and I would like to reserve that position.

THE COURT: I thought Mr. Hyde had-- is that the tax return of Hirsch and--

MR. BROOKS: Mr. Hyde has put into evidence the partnership tax returns. This is the personal tax return of the taxpayer which I have marked Exhibit N-1.

THE COURT: All right.

(New York Stock Exchange Exhibit N-1 received

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in evidence.)

MR. BROOKS: I have no further questions of Mr. Kohns.

CROSS EXAMINATION

BY MR. HYDE:

Q Mr. Kohns, are you familiar with the term surprise audit?

A Yes, sir.

Q What does that mean to you?

A Under stock exchange rules a member firm must send the exchange a letter appointing an outside accounting firm as their auditor for the year. The auditors have an agreement with the exchange that they will notify the exchange I think Mr. Lill testified by February, of the month in which they would make an audit.of the firm in question. In any case, once a year an audit is made at a time unknown to the firm involved by their appointed accounting firm, outside accounting firm.

Q When you say an audit is made do you know what reports are filed by the stock exchange with the SEC pursuant to that surprise audit?

A Yes.

Q Would you tell us what your understanding is?

A Very lengthy and detailed documents.

Q Do you know what they are called? What the component parts are?

A No, but it's been testified to here in the last few days and I won't disagree with what's been so testified.

Q You know there is a part called answer to financial questionnaire, do you not?

A I really don't know.

Q You don't know that the auditors file an answer to financial questionnaire in connection with the surprise audit?

A The technicalities I am unfamiliar with. I know they file a rather complete audit.

Q Are you familiar with the fact that they file a computation of net capital for purposes of Rule 325 of the stock exchange as part of the surprise audit?

A Yes.

Q Are you familiar with the fact that they file a letter commenting on the firm's accounting system, internal accounting control, procedures for safeguarding securities?

A Yes.

Q You were familiar with that fact in 1970, were you not?

A Yes.

Q Now, in connection with the Hirsch-duPont merger did you ever request duPont to furnish you with a copy of their most recent answers to financial questionnaire?

A I am under the impression I did.

Q Did you receive it?

A I received whatever I asked for.

Q Did you ask duPont to furnish you with a copy of their most recent audited computation of net capital for purposes of Rule 325?

A I believe so.

Q Did you receive it?

A If I asked for it I received it.

Q Did you ask duPont to give you a copy of the most recent auditors' letter commenting upon its review of duPont's accounting system, internal accounting control and procedures for safeguarding securities?

A I don't think I did.

Q You knew of the requirement that such a letter be filed I believe you said?

A Yes.

Q You elected not to request a copy of that letter?

A I do not recall asking for it.

Q Was there any instance, Mr. Kohns, where you

requested information or a document from duPont which was not given to you?

THE COURT: He's answered the question, Mr. Hyde.

Q Mr. Kohns, did Hirsch & Co. retain Haskins & Sells to render any report to it in connection with the financial condition or affairs of Francis I. duPont & Co. with respect to the proposed merge?

A No.

Q Did you ever have any discussion with any of your partners concerning the possibility of having an audit done of duPont in connection with the merger?

A Not that I recall.

Q Going back some months or a year earlier consideration was given to a merger of Hirsch with Hentz & Co., was it not?

A Yes.

Q And is it not a fact that the firm of Lybrand Ross Bros. and Montgomery was retained to render a report in connection with that proposed merger to the proposed parties?

A It was.

THE COURT: Who retained the firm? Both parties, or Hirsch or --

THE WITNESS: Your Honor, they were working in Hentz's office to make suggestions to reorganize their back office operations, and at the time we were discussing the merger the Hentz partners told us of that and said they are familiar with our operation, would you have any objection if they sent in a staff to enable them to make a comparison. They did send in such a staff, and at a meeting the Lybrand partners presented on a blackboard a comparison of important facts of the two firms comparing them.

THE COURT: I see. Thank you.

THE WITNESS: We split the bill for that work.

THE COURT: I see.

BY MR. HYDE:

Q- Now, you have testified, Mr. Kohns, with respect to meeting with Mr. Petrillo of Haskins & Sells. Did you look upon Mr. Petrillo, I believe you testified in your deposition, as father confessor?

A Yes, the expression is perhaps a little awkward, but--

t2b pm

Q Well, what did you mean by it?

A I considered him an authority on Wall Street, and when I ran into problems that I realized he would be familiar with I went to him for answers as to how we could handle similar problems and to give us advice.

Q When was the meeting with Mr. Petrillo to which you have been referring in your testimony? Can you place it in point of time?

A I again run into difficulty of not being able to split between the first series of meetings and the second series. I am under the impression it was during the second series but I am far from sure.

Q Do you recall that Mr. Petrillo went on vacation in Europe towards the end of May or the beginning of June of 1970?

A No, I do not.

Q You have no recollection of his being away and returning late in the game, so to speak?

A No.

Q In connection with his assignment, I believe it has been testified that Mr. Gariboldi found substantial discrepancies in long and short positions at Francis I. duPont.

MR. CAMHY: Your Honor, I object to the char-

acterization of testimony. That is inaccurate.

THE COURT: I missed, I am afraid, the second words. Whose assignment?

MR. HYDE: Mr. Gariboldi's assignment. In connecti with his assignment.

MR. HYDE: Yes, whether or not he found substantial discrepanices in the --

MR. CAMHY: Your Honor, I think what Mr. Gariboldi said was that he found differences in the ~~nen~~technical sense, not discrepancies, he found that they were carrying differences, differences accounts, securities account differences, long differences and short differences.

MR. HYDE: Let me withdraw the question then.

Q Mr. Kohns, do you remember testifying on your deposition at page 114, and let me go over to the prior page to 113 "Tell me what was said by whom as best you can recall?

"A I wouldn't attempt to give you anything but a few cursory words. Gariboldi found some substantial discrepancies in long and short positions--"

MR. CAMIY: Your Honor, I thought he was alluding to what Mr. Gariboldi said. I wouldn't expect Mr. Kohns to use the correct terminology, I would expect Mr. Gariboldi to.

Q Well, let me ask you this: Do you remember

Mr. Gariboldi having found and reported to you that there were substantial discrepancies in long and short positions in Francis I duPont?

A Having heard Mr. Camhy's remarks you embarrass me by your question.

Q I would like your recollection,not Mr. Camhy's.

A I can't remember specifically whether he used the word discrepancy or difference.

Q Well, what is your best recollection as to what Mr. Gariboldi reported with respect to long and short differences?

MR. CAMHY: Your Honor -- what page are you on, Mr. Hyde?

MR. HYDE: I am asking the witness a question.

MR. CAMHY: Would you tell me what page you are quoting from?

MR. HYDE: I quoted from 113 and 114.

MR. CAMHY: Would you look at the bottom of that?

THE COURT: He is not on that any more.

MR. CAMHY: All right. Because it seems we had the same problem on the deposition.

Q I want your recollect, Mr. Kohns, of what Mr. Gariboldi had found and reported to you in connection with security differences.

A The figure that occurs to my recollection is $10 million.

Q Of which difference? The short difference?

A I thought it was on each side.

Q Now coming to your meeting with Mr. Petrillo would you tell us first of all who was present at that meeting and what was said?

A Mr. Hirsch, Mr. Mundheim, possibly but not certainly Mr. Braiman, and Mr. Petrollo, it is barely possible one other of my partners was there and I am not clear in my recollection that. I do know that Mr. Hirsch, Mr. Mundheim and I were there. And Petrillo was the only non-Hirsch partner there.

Q What was said?

A I said, "Pete, as you know, we are discussing getting together with duPont, we are rather close to an agreement. What do you think of it"?

And he said, "Paul, provided they can get proper management, by which I understood back office management, I think it will be a good idea, or it will work out all right." I then told him what Mr. Edmond duPont had told me regarding the $20 million contract, and he said, "Paul, Emond is a man whose word is better is better than his bond." Considering my opinion of Mr. Petrillo, my reliance on his

knowledge, especially as auditor perhaps of duPont, I considered that a very favorable comment.

Q Let me ask you this: Did you interpret his statement about Mr. Edmond duPont as a character reference?

A Yes, it perhaps had particular application to the $20 million but it was more general than that. Yes, it was a character reference.

Q With respect to his statement that with good back office management he thought things would be all right. What did you understand the meaning of that statement to be?

A That like all of Wall Street and most of New York banks the bookkeeping departments were out of balance and overloaded with paper work. And he was referring to management to overcome those difficulties.

Q Do you recall testifying on deposition that you understood his words to mean that duPont's back office was a bloody mess?

A Do I understand he had said that?

Q No, no. Did you understand his statement that with proper back office management it should be all right, to mean that duPont's back office was a bloody mess?

A I certainly understood it to be a reference to the fact that their back office was in unsatisfactory con-

dition, yes.

Q You don't recall using the words,"a bloody mess," on your deposition?

A I have had it read to me twice since I am on the stand, therefore, I now remember it, yes.

Q Just before lunch, I believe, Mr. Kohns, you testified that Mr. Petrillo also characterized something that Mr. Gariboldi had said, or reported to you, as being in your words nonsense. Do you recall that testimony?

A I recall it only as a result of having read Mr. Weil's pretrial examination recently.

Q You didn't recall at the time you gave your deposition, did you?

A No, I did not see Mr. Weil's deposition until the last few days.

Q Do you recall it now or are you simply making refernece to Mr. Weil's deposition?

A I am making reference to Mr. Weil's deposition.

Q You have no independent recollection of this matter?

A No.

Q Let me ask you this: Do you ever recall Mr. Petrillo telling you that any figure which Mr. Gariboldi had reported to you was not accurate?

A The only reference Mr. Petrillo made to anything that Mr. Gariboldi said was in that meeting and I have already just told you that I cannot remember what was said at the meeting.

Q Mr. Kohns, I would like to direct your attention to Plaintiffs' Exhibit 1, the merger agreement, particularly paragraph 2-C. Do you have Exhibit 1 before you?

A Yes, I have. Paragraph what?

Q 2-C. This does not appear to be paginated but it is near the beginning.

A Yes, sir.

Q Was a balance sheet of duPont as of April 30, 1970, delivered to Hirsch pursuant to that paragraph?

MR. CAMHY: 2-C? Again maybe I am -- all right.

A Yes, I believe so.

Q You did receive a balance sheet dated April 30th?

A I am sorry?

Q You did receive a duPont balance sheet dated April 30, 1970, did you not?

A I believe so, yes.

Q I show you Plaintiffs' Exhibit 243 and ask if you can identify that as being a copy of the balance sheet referred to in the merger agreement (handing).

A I think it is, yes.

MR. HYDE: May we have this received in

evidence? I don't believe it was offered.

MR. CAMHY: Your Honor, I think I should call to the Court's attention that this is something that we simply found in the files. When we tried to show it to our client, get it identified beyond it being there we had some difficulty. I am prepared to accept it but I don't want to vouch for its authenticity.

MR. HYDE: I think the witness just identified it.

MR. CAMHY: I think the witness is just really going along here. I think it is all right, I don't have any problem with it. But I don't want anybody to think that anybody has looked at it and said yes, that's it because I have yet to hear anybody say that in this case.

THE COURT: All right.

MR. HYDE: Mr. Camhy, do you have the original of that Exhibit so it can be --

MR. CAMHY: No, this is what I have. This kind of a thing.

xx (Plaintiffs' Exhibit 243 was received in evidence.)

MR. CAMHY: Well, we have a problem with the marking. It is received in evidence as a defendants' exhibit. Would you give it a defendants' number? It's got

a plaintiffs' number right now.

THE COURT: All right.

xx (Defendant Haskins & Sells Exhibit W was received in evidence.)

xx (Exhibit 243 number is withdrawn.)

Q Mr. Kohns, I believe you testified this morning that in your meeting with Mr. Edmond duPont you were told that duPont, I think I am quoting you accurately, was more than 1500 per cent into aggregate indebtedness. Do you recall testifying to that?

A Yes.

Q What did that mean to you?

A That they needed capital.

Q That meant that they were thena there above the safety guidelines prescribed by the New York Stock Exchange?

A Yes.

Q Did you inquire as to how far above the guidelines they were at that time?

A The percentage itself gave some indication.

Q What was the percentage?

A Between 15 and 1600 per cent is my recollection.

Q Let me show you Stock Exchange Exhibit C, special operations questionnaire of duPont. I direct your attention to a column headed 6/11/70 and ask you

if you were aware prior to the merger that duPont had a capital ratio of 1,699 per cent (handing).

A I have no recollection of that fact, no.

Q But you did know it was 1600 per cent or thereabouts

A Yes.

Q I think you described this so-called standby capital agreement as a legal document, did you not?

A I intended to.

Q By intended do you mean that it was a legal document?

A That was my understanding.

Q Did you ever ask any of your counsel, Mr. Feurst or Mr. Fuld, to review that agreement before you?

A Never occurred to me to do so.

MR. HYDE: I have no further questions, your Honor.

MR. POLLACK: No questions, your Honor.

THE COURT: It is close to 3:30. I will give you ten minutes to get organized. We will take a 10-minute recess.

(Recess.)

REDIRECT EXAMINATION

BY MR. CAMHY:

Q Mr. Kohns, when you received the materials that you got from duPont, what did you do with them?

A I saw that they got in the hands of a good number

of partners.

Q And who were they? Was Mr. Gariboldi one of them?

A Yes. Mr. Garibold, I think all three of the back office gentlemen got them. My recollection would be that Mr. Weil, Mr. Gariboldi and Mr. Norman all got them, and some of the junior partners weren't interested, some of the floor partners weren't interested but a good many of the partners also.

THE COURT: Only one of those men was a partner, though? Only Mr. Weil?

THE WITNESS: Only Mr. Weil was a partner of the three I mentioned. I am sorry, yes, your Honor.

Q Now I show you Exhibit 109 which is this capital computation as at the last audit for this 3,042 ration. Do you rememver ever being show that (handing)?

A No, sir.

Q Well, you said that you asked for capital computations Do you remember, are you that sure that you asked for this or got this? Because apparently you say you didn't see it. And Mr. Gariboldi, I suggest to you, testified that he didn't see it, and Mr. Norman testified that didn't see it.

A Oh, I am sure I didn't see it. What I meant by my answer was Maury sent computations which may have been

made by the firm informally.

3 A pm THE COURT: What did you show him, is that Exhibit 109?

MR. CAMHY: Exhibit 109, yes, your Honor.

THE COURT: All right.

A If I may enlarge my answer --

A Well, not for me, you know. If his Honor now wants to hear it I would have no objection, but I am not asking. Wait a minute. What is the answer?

THE WITNESS: Had I seen that figure there would have been no merger.

Q Had the year 1968 been a profitable one for Hirsch & Company?

A Very.

MR. CAMHY: Your Honor, as rebuttal since we are doing it that way, I would like to introduce the 1968 figures and we will argue from them later but the point I am trying to make is they lost some money in '69, they made a lot of money in '68, that is the other side of that argument.

THE COURT: Well, I understand that. I don't think you need it. Mr. Kohns' testimony has made that clear. I think he testified, there has been no contradiction of it. The only time they lost any money before 1969 was some time in the '30s.

BY MR. CAMHY:

Q Do you remember the approximate amount of the profit in 1968?

A I do not.

MR. CAMHY: Your Honor, may I have leave to submit that number from this and avoid having to put this in? Gentlemen, would you object if put the '68 profits in and then --

THE COURT: Well, you have my permission to do that. I didn't ask for their permission to ask that.

MR. CAMHY: I thought you were pointing to them, I am sorry.

THE COURT: Once they agree to that figure, if the figure you gave us is correct.

MR. CAMHY: All right.

Q Following your agreement to subordinate your investment, or a part of it, in duPont, in December of 1970 were you everpaid the full amount of your investment left in the firm?

THE COURT: We went over that on direct.

MR. CAMHY: Yes, I just want to mark an exhibit. Well, let us mark the exhibit. I heard that testimony on direct.

Q I show you Exhibit 12 and ask you whether you

received this letter (handing).

A Yes.

MR. CAMHY: I offer it into evidence. This is the disclaimer letter by duPont Glore Forgan.

THE COURT: Mr. Brooks, Mr. Hyde, Mr. Pollack, Mr. Singer, any objection?

MR. BROOKS: Your Honor, may I ask a question on voir dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR.BROOKS:

Q Mr. Kohns, when did you receive Plaintiffs' Exhibit 12?

A May I see it?

MR. CAMHY: Here you are (handing).

A To the best of my recollection within a day or so of the date on the letter, October 7th, 1971.

MR. BROOKS: I have no objection.

THE COURT: Mr. Hyde?

MR. CAMHY: Your Honor, I want to make it clear that I am not offering this for the truth of what it contains. I am offering it as the letter that he got.

MR. HYDE: With that understanding I have no objection.

THE COURT: All right. It is received.

xx (Plaintiffs' Exhibit 12 was recieved in evidence.)

BY MR. CAMHY:

Q Now, following the receipt of this letter, did you not retain counsel to see if you could check on this obligation? Did you retain my firm for that purpose?

A Yes, sir.

Q And as a result of that litigation, wasn't there a settlement at some time?

A I received a hundred thousand dollars from duPont in full and final settlement of my claim against them.

MR. CAMHY: All right. Your Honor, the letter refers to an audit prepared by Haskins & Sells. That was the audit that I had Mr. Lill identify but did not offer at that time. I would now like to offer the Haskins & Sells audit to which the letter refers.

THE COURT: Well, I don't understand. I don't understand the purpose. What is the purpose of the audit? I understand the purpose of the letter in terms of my learning what finally went on but I don't understand -- this is October of '71 audit?

MR. CAMHY: No, this is an April 30, 1971 audit

about three months after they left and it continues to deal in the same problems that they had the previous October.

THE COURT: All right.

MR. CAMIY: It has references to large differences clean up, foot notes, et cerera and as a result of that they just didn't pay anybody.

MR. HYDE: I object on the grounds of relevancy, your Honor.

THE COURT: I think it is relevant.

MR. HYDE: This is too remote as to time, I submit.

THE COURT: That objection is overruled.

MR. BROOKS: Your Honor, I object for the reason that it is an audit of the merged firm which Mr. Lill was said he could not determine where the differences came from, whether they came from one of the three firms or two out of three or where. So if they are submitted for that purpose I submit they are incompetent.

THE COURT: Mr. Lill also testified that some of the -- large numbers of some of these matters that they have to have originated in the original duPont Company as I understood his testimony but in any event the objection is overruled. It is received.

xx (Plaintiffs' Exhibit 225 was received in

evidence.)

MR. HYDE: Your Honor, I would call attention for the record that Haskins & Sells audit only goes to the aggregate loss. The letter goes on to refer to internal calculations allocating that loss to different time periods. That was not contained in the Haskins & Sells audit which is going into evidence.

THE COURT: Now say that again, please.

MR. HYDE: The letter, your Honor, this is the paragraph at the bottom here, says "The results of the recent" --

THE COURT: What letter arewe talking about now?

MR. HYDE: The one just received, Exhibit 12, Plaintiffs' Exhibit 12.

THE COURT: On the one before this.

MR. HYDE: Yes. It refers to an audit as of April 30, 1971, showing an aggregate operating loss of approximately $33 million but then it goes on to say, and this is my point "Internal calculations now in the process of finalization allocate that loss to the appropriate time periods."

Now, Haskins & Sells was not allocating that loss to any time period in the audit which is just going into evidence,that is my point.

THE COURT: All right. Thank you.

BY MR. CAMHY:

Q You testified that subsequent to the merger you had a conversation with Mr. Forg an in which you --

A With who ?

Q Forgan, in which you felt that you had been had in some way. At that time were you thinking that the New York Stock Exchange was responsible? I mean, you had just gotten into duPont and now there were these -- did you feel that the Stock Exchange had mislead you at that time or were you mad at them at that time?

A No, I did not -- no, not at that time.

Q Did you feel at that time that you had been defrauded by Haskins & Sells?

A I felt they must have had knowledge that they not revealed.

Q Well, did you have any evidence to base that on?

A None.

Q In December of 1970 when certain partners withdrew and were paid in full, that was at the time of the Perot reorganization, is that right?

A Yes.

Q Are you aware that these same partners who were paid in full were subsequently sued by the organization to recapture that payment?

A I am aware.

Q And are you aware that those cases were also settled?

A Yes.

MR. CAMHY: I have nothing further, your Honor.

MR. BROOKS: No further questions.

THE COURT: I want to remind you, Mr. Camhy, that you had indicated that the exhibit which Mr. Brooks introduced was not the -- does not set forth all the conditions of Mr. Kohns' --

MR. CAMHY: Yes. There is another instrument that was involved in that dispute, your Honor. It is marked Plaintiffs' Exhibit 9. And I am in no better position to identify this than the witness is. It is a subordinated loan agreement.

THE COURT: Well, you had better show it to the witness.

MR. CAMHY: All right.

(Handing.)

Q Is that the subordinatedloan agreement which followed from Exhibit N and was filed with the Stock Exchange?

A Yes, sir.

THE COURT: All right.

MR. CAMHY: I offer Plaintiffs' 9.

MR. BROOKS: No objection.

MR. HYDE: No objection.

THE COURT: All right. Thank you.

xx (Plaintiffs' Exhibit 9 was received in evidence.)

THE COURT: All right, you may step down, Mr. Kohns.

(Witness excused.)

THE COURT: All right.

Call your next witness.

MR. CAMHY: Mr. Weil, please.

T H O M A S L. W E I L, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CAMHY:

Q Are you a former partner of Hirsch & Company?

A I am.

Q Prior to the duPont merger how long had you been a partner?

A 1968 until July 1, 1970.

Q What was your job?

A I was a general partner in charge of the back office.

Q Were you the fellow who was back there doing things?

A I hope so.

Q But yours was a first-hand back office --

A Yes.

Q We have had Mr. Mundheim referred to as the back office partner. Was there a difference between what you did and what he did?

A Yes.

Q Will you tell us that,please.

A Mr. Mundheim was the back office supervisor and supervised the work that I did but as far as the personnel and administration of the personnel I handled the actual assistance and physical work and followed through approximately.

Q Now at the time the merger was announced, or not announced, excuse me, at the time the discussion for the merger began, did you take an interest in the question?

A Which discussions? At what time? What period of time?

Q As I understand it, there were two sets of discussions. Did you interest yourself in either of them?

A In the first one, no, I did not.

Q What about the second one, did you interest yourself in those?

A I don't know what you mean by the word interest.

Q Did you involve yourself, try to find out things?

THE WITNESS: I don't understand what you mean by interest yourself.

Q Did you try to find out some information?

A Absolutely.

Q Among the information, did you have occasion to see the special operations questionnaire (handing).

A I saw a special operations questionnaire, yes.

Q Just looking at these differences here --

MR. HYDE: May we have the exhibit number?

MR. CAMHY: Yes, it is 52.

Q 10 and 9. Do you recall that as approximately the magnitude of the differences that you were made aware of?

A By reading that, yes.

Q Now, you were negative on the merger, weren't you?

A Yes.

Q Did this have to do with your feeling about what you had heard about their back office?

A Yes.

Q Were you present at a meeting in which the question of these differences was discussed?

A Yes, I was.

Q Can you tell the Court who else was there and what was said?

THE COURT: Also I would appreciate knowing when the meeting was.

Q Yes.

When was the meeting?

A I believe the meeting was some time in the last two or three weeks of June of 1970. I believe there was Mr. Kohns, Mr. Mundheim, Mr. Hirsch. I believe Mr. Framen was there but I amnot positive of that. Mr. Petrillo, Mr. Gariboldi, myself, and I was originally under the impression that one of our attorneys may have been present at the time. I do not whether it was Mr. Taikovsky or Mr. Feurst.

Q Did the subject of differences come up?

A Yes, they did. A comment was passed by Mr. Gariboldi to Mr. Petrillo stating the amount of difference that he had discovered on this form as we were reading it together and the comment was passed that you get rather excited and there is nothing to worry about. That was passed by Mr. Petrillo to Mr. Gariboldi.

THE COURT: Would you read back what Mr. Petrillo is supposed to have said? I mean, I didn't get it.

MR. POLLACK: Your Honor, may we have the last

answer reread?

THE COURT: I am asking the same thing. Have the whole question and answer read back.

(Read.)

THE COURT: I still don't get it. We were rather excited? I still don't understand --

(Read.)

BY MR. CAMHY:

Q Now, at that time, or at any time prior to the merger had you ever seen a Haskins & Sells capital computation as at the last audit of the previous settlement which reflected a ratio of 3,242?

A No, I did not.

Q To the best of your knowledge had anybody such as Mr. Gariboldi or anybody on your team who was working on it, had they ever mentioned that to you?

A On my team?

Q Not on your team, on the Hirsch side, yes.

A On the individuals that I worked with --

Q Did anybody ever tell you --

A No, they did not see that.

Q Were you aware that this computation reflected a $6.8 million capital deficiency?

A No, I did not.

Q Were you aware that this deficiency was made up in cash in the month or two following the audit date?

A No, I did not.

Q Were you aware that a subsequent computation by the Exchange as at the audit date added a further deficiency of $8.1 million for dividends on securities failed to received?

A No.

Q Were you aware that the Exchange's subsequent computation fixed ratio at in the 70 thousands magnitude as at the audit date?

A No.

Q Were you aware that the additional deficiency was made up in substantial part by a decision to realize funds out of the sale of long differences in the differences accounts?

A No.

Q Were you aware that that is how to the extent of $6 million capital ratio was achieved?

A If you are using the word aware as versus rumors, no, I did not. Rumors, yes.

Q You say there were rumors around that duPont was doing wrong things?

A There were --

MR. BROOKS: I object.

MR. POLLACK: I object to the form of the question, your Honor.

THE COURT: Objection sustained.

Q Did you receive any information, hard information?

A No.

Q And did you ever communicate anything like that to Mr. Kohns, Mr. Mundheim or Mr. Hirsch?

A No.

Q And was any of that ever said --

MR. CAMHY: Strike that.

Q Did Mr. Petrilloever mention any of these things to you?

A Definitely not.

Q And at that meeting at which Mr. Gariboldi complained about these differences, did any of those facts ever come to anybody's attention?

A No.

MR. CAMHY: I have nothing further, your Honor.

THE COURT: Mr. Weil, I am not sure, I would like to know what was your role in connection with the merger?

THE WITNESS: My responsibility was to move all of the firm's securities and customers' securities to the firm of Francis I. duPont.

THE COURT: No, I mean before that.

THE WITNESS: Prior to that?

THE COURT: At the end of June when you interested yourself, whatever the word was, that you got involved. Prior to the time the agreement was signed you had some role, didn't you?

THE WITNESS: Yes, I did.

THE COURT: What was that?

THE WITNESS: To move the securities from Hirsch & Company over to the firm of Francis I. duPont & Company and/or to a customer that didn't want it to go to the firm and send it to the customr themselves.

THE COURT: You played no part in the finding out about duPont's back office problems and matters of that kind?

THE WITNESS: No.

THE COURT: All right. Thank you.

All right. Who want to cross examine first?

All right, Mr. Brooks.

CROSS EXAMINATION

BY MR. BROOKS:

Q Mr. Weil, could you give us a little bit more background on your career in the securities industry? For whom did youwork before youcame to Hirsch as a managing partner? I mean back officer partner, excuse me.

A I started with Hirsch which was the old Hirsch, Lillienthal back in 1940.

Q In what capacity?

A Various areas in the back office, margin department, P&S department and stock record.

(Pause.)

Q Where did you go next?

A McDonnell & Company, at which time I was the head margin clerk and I become assistant vice president in charge of the back office. I left them in 1964 to come back to Hirsch & Company as an assistant to the administrative partner, and in 1968 became the partner in charge of the back office.

I mayhave left something out in between.

Q When did you first hear of the possibility that Hirsch would merge with duPont?

A If my memory serves me correct, the first time was some time in February of 1970.

Q At that time did you form an opinion about whether that wuld be a good thing for a bad thing for your firm to do?

A It would be hard to say because I heard about the merger and it was cancelled, talks were cancelled.

Q Whether you heard about it before or after, did yoi form an opinion at thattime about whether it would be --

A I would have to assume I had an opinion, yes.

Q What was that opinion?

A Stay away.

Q What was the opinion based on?

A The various rumors that were going over the street as to which firms were in trouble and how serious their troubles were at Francis I. duPont.

Q When did you next hear of the prospect of a merger being back on the track?

A I believe in the first or second week of June 1970.

Q How did you hear about it?

A I received a phone call at my home as I was preparing to go on vacation. Mr. Kohns informed me that he had signed, I believe, a preliminary agreement with duPont for merger and could I please come into the office, which I did, that Monday.

Q What happened next?

A If I remember correctly when I came in there with rumors all over the firm as far as the personnel of our firm was concerned, they were worried about their jobs, and a memo was sent to all of these individuals advising them that if at all possible there would be a job for them at Francis I. duPont.

Q Did you ever receive a request from any of your

partners to check out Francis I. duPont's back office with a view toward seeing whether it would be -- have a suitable quality to it to merger with Hirsch & Co.?

A To the best of my knowledge, no.

Q Did you ever do that?

A No.

Q Did you ever review in June of 1970 any recent reports of Francis I. duPont in an attempt to gain an up-to-date knowledge of their status with respect to back office problems?

A I did read a special operations questionnaire but I will not say that it was a recent one.

Q I believe you testified on your direct examination that you saw Exhibit 52.

Let me show you that again (handing).

MR. CAMHY: Your Honor, I am not sure that that was his testimony.

A That was not my testimony. I remember replying that I had seen a special operations questionnaire but I did not tell you -- I did not know what the date was. I could not remember it at the time.

Q What did you ask for when you obtained the questionnaire that you did see?

A I don't follow what you are saying.

Q Well, put it another way. Did you ask for the most recent questionnaire available?

A I did.

Q Do you recall how recent it was, when it was given to you?

A Frankly, no, I do not.

Q Did you ever receive a request from Mr. Kohns to go over to the duPont firm and meet with Mr. Edmond duPont?

A Did I receive a request from Mr. Kohns?

Q Yes, to go over and meet Mr. duPont?

A No. No, I requested of Mr. Kohns that I would like to go over and meet Mr. Edmond duPont.

Q What did Mr. Kohns say?

A He would arrange a meeting, which he did.

Q When did the meeting take place?

A I am sorry, I can't recall the exact date.

Q Would it be in late June?

A No. I think it was in the first part of July, frankly.

Q Was it before or after the merger?

A I believe itwas after the signing of the merger.

Q Is that after July 2nd then?

A Oh, absolutely That I am fairly certain of.

Q Mr. Weil, did you meet with any other people at duPont besides Edmond duPont in June or July?

A Yes.

Q Who did you meet with?

A Peter duPont, Sam Gay, Pete Napoti and quite possibly others. Bob Gordon was one other, I think.

Q As a result of your review of the most recent questionnaire that you got, did you form a conclusion in respect to the security differences accounts?

A Yes.

Q What was that conclusion?

A They were in a sad state of affairs.

Q Did you report that to Mr. Kohns and Mr. Mundheim?

A I believe I did.

Q Was that at the meeting that you have referred to at which Mr. Garibold waspresent?

A No, because I believe that meeting was prior to the merger.

MR. CAMHY: Your Honor, may I have the last two questions read, please?

THE COURT_ All right.

(Read.)

Q When did you review the operations questionnaire which you had obtained by requesting the most recent

operations questionnaire?

A It would either be a few days before July 1st or immediately after July 1st.

Q Had the merger taken place at the time you made your report on the analysis that you made of that questionnaire?

A I can't recall, very honestly.

Q Mr. Weil, when all of the other Hirsch partners who decided to go into the merger signed the agreement, had you made up your mind whether to go along or not?

A Absolutely.

Q What was your conclusion?

A I refused to go.

Q So if they all signed on July 2nd I take it you had reached that conclusion on or before July 2nd, is that correct?

A Yes.

Q And at that time, or before had you advised Mr. Kohns of your conclusion?

A Yes.

Q Did you --

A That I would not go.

Q Right.

Did you tell them the reason why you would not go?

A I believe I did at that time, yes.

Q And what was the reason?

A Because I had felt that the firm of Francis I. duPont's back office was very sadly lacking in proper control. But that does not mean that I had read the special operations report to have that information. I had enough friends on the street that I was able to get information prior to a merger.

MR. POLLACK: Move to strike everything after "but"as not responsive.

THE COURT: Would you read it back.

(Read.)

THE COURT: The motion is denied.

Q Did your conversation with Edmond duPont take place before you formed the conclusion that you would not go into the merged firm?

A Definitely not.

Q It di dnot?

A It did not.

Q Why were you talking to Mr. duPont at all if you had concluded that you wouldn't go into the merged firm?

A Peter duPont had made a decision that he did not want to handle the back office and he wanted to go back into the computerized portion of the firm. Sam Gay was leaving the firm. I had been asked to take over the operations of

Francis I. duPont and Mr. Kohns and I believe Mr. Mundheim were asing me what would persuade me to go over there. And I said that if I could get a proper answer to certain questions from a responsible individual such as Mr. Edmond duPont I will be more than happy to reconsider. And then I know distinctly that was after July 2nd.

Q Mr. Weil, you received the most recent questionnaire that you requested considerably before July 2nd, didn't you?

A I said I cannot remember whether I did or not.

Q Let me try to refresh your recollection, reading from your deposition. Let me read the answer that you gave at the bottom of page 23, top of page 24. I will read a couple of questions before that. The bottom of page 23 question line 19:

"Q How did you come to review the documents that you previously testified you had seen?

"A Well, Mr. Gariboldi.

"Q With respect to duPont.

"A Mr. Gariboldi and I felt that we should know something about the firm rather than what we read in the newspapers or heard through various sources on the street and requested that one of the things be given to us, either the special operations questionnaire which every firm filled out

if I remember correctly at the time, roughly every quarter, or the last audit report that was completed by their auditors at the time outside accountants. I do remember distinctly that we did not get it the first week. I don't remember getting it the second week. We had to keep pressuring to get a copy of it. and we finally did receive a copy of it which was approximately about, I have to say to the best of my knowledge, about a week before the final signing. Again as I said before, I have gone through three mergers since then,so it is a little hard putting them back together.

"Q Right.

"A A meeting was held then with Mr. Petrillo, Mr. Mundheim, Mr. Kohns, Mr. Hirsch, Mr. Framen. Again, I think it was Ed Feurst from Guggenheimer, Mr. Gariboldi and myself. The general discussion.

"Q Tell me what you said at the meeting.

"A At which time we reviewed this form. Again I think it was the special operations questionnaire. And again looking it over we found that there were approximately nine or ten million worth of securities differences".

Does that refreshyour recollection that you reviewed this form and reported on it to Mr. Kohns and Mr. Mundheim and the others prior to the signing of the merger contract?

A If I stated that in my deposition then yes, it refreshes my memory.

Q You would go along with that --

A Absolutely. absolutely.

Q Mr. Weil, when you reviewed those security differences, did you form a judgment that there were a lot more differences than were shown by the figures that were on the form?

MR. CAMHY: Excuse me, your Honor.

I want the time fixed. There are two things involved, one, review of a questionnaire and the other the review of the differences.

THE COURT: All right, I think that is fair.

MR. CAMHY: Different times apparently.

T3b

Q I am talking about the times you got these most recent forms and reviewed them before merger then you had a meeting, Kohns at one time and then Framen and possibly some others, Gariboldi, and you told them about the differences. Did you tell them there were probably a lot more differences than there were shown on that form?

A I did.

Q What did they say?

A I'm sorry, I really don't recall unless you can refresh my memory.

Q Do the last questions and answers refresh your recollection on whether the meeting you had with Mr. duPont was before the signing of the merger contract?

A No, there was no need for that. I know definitely it was after July 1st.

Q What did Mr. duPont say to you at the meeting you had with him?

A I asked a specific question considering the condition of the firm and the capital that was now required just how long could the family afford to put money into the firm.

Q What did he tell you?

A And I was told that the well has to run dry eventually. And that was all I wanted to hear.

Q That was enough for you?

A Yes.

Q Did you tell Mr. Kohns and Mr. Mundheim what Mr.duPont had said?

A I passed a comment to both parties because they were the ones that were interested in my going over to the firm.

Q What did they say when you told them --

MR. CAMHY: May we have the time fixed again before or after the merger?

THE WITNESS: This is after the merger.

THE COURT: After the merger. He's been saying that all along.

A I believe the comment was passed that I probably misunderstood what I heard.

Q Did that make you feel any better about it?

A Why should it make me feel better? I had already made my decision.

Q When you reviewed that most recent questionnaire did you report to Mr. Kohns and Mr. Mundheim that you had some concern about the dividends and the transfers and the late fails that were reflected on it?

A I would say yes.

Q What did Mr. Gariboldi say at that meeting about

these problems?

A I believe the comment that he passed was directed at Mr. Petrillo.

Q What did he say?

A At which he stated that there were approximately ten million dollars on either side of differences, and Mr. Petrillo replied as I had quoted before.

Q Was the reason why you didn't go to the duPont firm because of these problems the securities differences and other back office problems that we have just discussed?

A Yes.

Q Was there any problem which you considered relevant in reaching a determination on not to go to the duPont firm which you did not advise Mr. Kohns and Mr. Mundheim?

A No. This is a personal opinion of mine.

Q I agree. But all I want to know is whether you shared that opinion with your fellow partners.

A I don't believe so.

Q When you reported on your visit, or your analysis of the most recent questionnaire, I believe you told me you discussed the fails, the aged fails, the dividends, the securities differences. You told me that you discussed that with Kohns and Mundheim and the other people at the

meeting, is that correct?

A Yes.

Q Now, when they were pressuring you to go to the duPont firm did you tell them that the reason you didn't want to go was because of these back office problems and the difference problems?

MR. CAHILL: I object to the word pressure.

Q Well, is that a fair word, Mr. Weil?

A To pressure me to go to the firm?

Q Yes, to become a partner in duPont.

A Fair enough.

Q Now when they were making entreaties upon you to do that did you tell them that you didn't want to go because of all these problems?

A I probably did among other things, yes.

Q At the time you made that explanation to them did you have any reason to believe that they knew what a difference was?

A Yes.

Q How did you have reason to believe they knew what a difference was?

A During the period of 1968 when the market was extremely busy most firms were not ready for it, and as a result they fell behind in their record keeping. Their

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differences then became some of our differences as a result, and we gradually had partners' meetings I believe once a month at which time these differences were discussed that we at that time had and the problems that we ran into with other firms with their differences.

Q Did you ever have discussions with Messrs. Kohns and Mundheim in which you pointed out to them that differences could cause a drain on capital because you would have the buy in differences that you couldn't research away?

A I believe I did.

Q And that was before July 2nd, was it not?

A I believe so.

Q Was the existence of securities differences one of the reasons why the Hirsch firm rejected a merger with the firm of Robinson & Company?

A One of the reasons, yes.

Q Was the problem of securities differences discussed at that time when consideration was given to merging with Robinson & Company?

A I believe it was, yes.

Q Did you partake in the discussion?

A I did.

Q Did you tell Messrs. Kohns, Mundheim prior to the start of the second series of merger discussions with

duPont that you believed the Hirsch firm should keep away from duPont?

A Prior to the start of the second series?

Q Right. You have testified that you formed an opinion at or shortly after the time of the first series that Hirsch should keep away from duPont.

A Right.

Q What I want to know is had you communicated that opinion to the big three before they started talking to duPont again.

A I do not believe so. The original talks were terminated and I felt there was no need to at that point.

Q Let me try to refresh my recollection on that question, Mr. Weil, by reading from your deposition at page 20.

"Q Did you voice your opinion at the time of the first series of negotiations to any of your other partners?

"A I don't know whether it reached that level. I think after the merger was turned down I may have voiced my opinion. I am rather outspoken to start off with. But I was not questioned what I thought of it at the time. And I do not remember.'

"Q Well, do you --

"A After the fact I probably did voice my opinion

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rather strongly.

"Q To whom, do you recall?

"A Oh, definitely it would be to the three senior partners involved. When I say senior partners I am referring primarily to Mr. Kohns, Mr. Mundheim, Mr. and Mr. Hirsch.

"Q I take it this was before what we called the secondary series of negotiations?

"A Oh, yes.

"Q But after the first?

"A But after the first. Yes.

"Q Do you recall what you said to Messrs. Kohns, Mundheim and/or Fraiman?

"A Not really. Not at that point, no.

"Q Would it be fair to say that you told them the substance of the opinion that you --

"A What I felt about it. Yes, I probably would have said something of that nature, that I felt it was a problem area over there. Why get into something like that? But I wouldn't swear to that at this point.

"Q The second one is a discovery." Does that refresh your recollection?

A Obviously.

MR. BROOKS: I have no further questions.

THE COURT: Do I understand your testimony, Mr. Weil, that when you -- I think it was established that at least ten days before the merger was effectuated you had reviewed the latest financial information of the duPont firm and had raised with Mr. Kohns and Mr. Hirsch the problems that you saw, was that done at a meeting at which Mr. Petrillo was present? Was that the time that you testified he made the statement in answer to Mr. Gariboldi?

THE WITNESS: Yes, sir.

THE COURT: Same time?

THE WITNESS: Yes, your Honor.

THE COURT: All right, Mr. Hyde.

CROSS EXAMINATION

BY MR. HYDE:

Q At that meeting, Mr. Weil, did you and Mr. Gariboldi point to the figures that you had found in your analysis of the duPoint financials with respect to items such as security differences?

A Yes.

A In the case of the short security differences I believe you said you had found approximately ten million dollars of unreconciled differences, is that correct?

A Yes.

Q And you found figures with respect to fails or

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alleged fails?

A Yes.

Q And you found figures with respect to dividends in the failed to receive position?

A Yes.

Q And in this discussion these figures were pointed out, were they not?

A Yes.

Q Did Mr. Petrillo at any time say anything to cast doubt upon the existence of the figures or the validity of the numbers?

A I do not believe so.

Q In other words, the context of this conversation was that the numbers are here, there was no question in your mind or anybody's mind that those numbers were there.

A I do not believe there was any question.

Q And they could be found for it looking in the financials?

A Yes.

Q Is it fair to say that Mr. Petrillo's comment was directed to what effect these figures might have upon a merged entity?

A Are you asking my opinion?

Q Yes. How did you interpret Mr. Petrillo's remarks?

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MR. CAMHY: Your Honor, he has quoted Mr. Petrillo. Now are we asking -- what is the question? How does he interpret it? He said what the man said. I object to the request for an interpretation.

THE COURT: Well, I will sustain that objection. However, you interpret it unless that interpretation was given to the parties that were there. Did you?

THE WITNESS: No, I did not.

THE COURT: All right, the objection is sustained.

Q Do you recall anything further that Mr. Petrillo said at the meeting to which you have testified?

A Not really, no.

Q How long a meeting was this?

A Rather short length of time. I am not positive.

Q And in connection with the discussion of all of these figures you recall no specific fact that Mr. Petrillo stated to you?

A To me directly?

Q Or anyone at the meeting.

A No, I do not.

Q Now I think you testified in response to a question by Mr. Camhy that you did not see a particular Rule 325 computation, I believe that is Plaintiffs' Exhibit 109. Let me ask you this: Were you aware in 1970 of the

requirement that the auditors file a Rule 325 computation in connection with each surprise audit?

A Yes.

Q Was this one of the items that you asked for?

A That I would ask for?

Q Yes.

A No.

MR. HYDE: No further questions.

CROSS EXAMINATION

BY MR. POLLACK:

Q Mr. Weil, in your direct testimony you testified about a meeting in late June, 1970, at which you placed the following persons, Mr. Kohns, Mr. Mundheim, Mr. Hirsch, Mr. Framen, Mr. Petrillo, Mr. Gariboldi and yourself, and possibly an attorney for Hirsch & Company. You then said that the subject of securities differences had been discussed. You said further that Mr. Gariboldi told Mr. Petrillo the amount and Mr. Petrillo told Mr. Gariboldi, "You get rather excited, there is nothing to worry about." My question to you, Mr. Weil is this: Isn't it the fact that no one from duPont was present at that meeting?

A Not that I recall.

MR. POLLACK: Thank you.

REDIRECT EXAMINATION

BY MR. CAMHY:

Q Is it clear that the amount under discussion at that time was eight or nine million?

A Yes.

Q Or ten million, in that area?

A Eight, nine, ten, yes.

Q And do you feel that you made it clear enough to Mr. Petrillo or that Mr. Gariboldi did that, there were implications behind the mere number?

A Did Mr. Gariboldi make that--

Q Or you made it clear.

A Mr. Gariboldi did.

Q And it was at that point that Mr. Petrillo said Frank you are getting a little excited over nothing?

A Yes.

Q And as I understand it you felt at that point there just wasn't any point?

A That's right.

MR. CAMHY: All right, thank you.

THE COURT: All right, thank you, Mr. Weil, you may step down.

(Witness excused)

THE COURT: Call your next witness.

MR. CAMHY: Mr. Mundheim, please. Your Honor,

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could I work with Mr. Lill instead? I have some short matters with Mr. Lill.

THE COURT: It is up to you. It is your case.

MR. HEIDELL: These are new matters I take it?

MR. CAMHY: May I have a minute to confer with counsel please?

THE COURT: All right.

MR. CAMHY: Mr. Mundheim please.

MARSHALL MUNDHEIM, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CAMHY:

Q What is your present age?

A 68-3/4.

Q Which would make you approximately 66 at the time of these events?

A 1970, no, in 1970 I would have been about 64-1/2 or so.

Q What was your education?

A I went to prep school here in the States and I went to Europe and I spent two years in Switzerland, the University of Luasanne and afterwards I spent two years in Italy at the University of Florence in Florence, Italy.

Q What kind of courses did you take at those schools?

A You know, general BA type courses.

Q What did you do after that?

A After that I worked a little -- I joined Stern Brothers, the department store in New York.

Q How did you get that job?

A My father was pres8dent. And before coming back to the States I worked in their foreign office in Italy and also in Paris.

Q What did you do at Stern Brothers?

A Well, I started pushing a truck.

Q What did you do after that?

A And working through the stock room, various kinds of menial jobs to learn the ropes. And then I gradually got into the merchandise field and became what was called a merchandise manager.

Q How long did you stay there?

A I stayed there until, I think into '32, maybe the beginning of '33.

Q How many years? Ten, eleven years?

A Oh, no. I don't think as long as that. I would judge from about 1927 or 8, that would be about fifty six years.

MR. POLLACK: Your Honor, we are having difficulty hearing, could the --

THE WITNESS: Sorry.

Q What did you do after you worked at Stern Brothers?

A I was employed by a soap company, a small soap company which had a New York office and the plant was in Hoboken, New Jersey.

Q How did you come to leave Stern Brothers?

A I think by that time my father had retired and we had a new president in and he wanted to bring his own team in.

Q And you went to work for the soap company?

A I went to work for the soap company and stayed there from 1933 until after the war. In fact, I enlisted in the beginning of 1942, I was just a shade over 35, and I enlisted in the Air Corps and stayed there until about December of '45. I was stationed overseas in the European theatre. Came back to the soap company in the beginning of '46.

Q What did you do at the soap company?

A Well, I was the head of the company, and I think my title was vice president and it was from a management standpoint rather than a technical standpoint because we had technicians.

Q You didn't supervise the making of the soap?

A No, I don't know anything about it.

Q Did you supervise the keeping of the books?

A No, other than just any other manager--

Q Were you in any way directly involved in operations?

A Management decisions.

Q At the top level?

A At the top level.

Q Then I gather you came back to that after the service?

A Oh, yes. And stayed there until Christmas '48.

Q Did your family have any money tied up in the soap company?

A Not directly. It was a subsidiary of a listed company, American Safety Razor Corporation.

Q Did your family have any money in the parent?

A Oh, yes, we had some shares.

Q Go on.

A In '48 I retired.

Q How old were you then?

A I must have been 62 -- 42. 42. And --

Q You just stopped working?

A I stopped working. My wife complained. And we had some interests, she had some interests in South America

and I liked Venezuela and I used to sort of go back and forth. I was a director of some companies here, U.S. Vitamin Corporation, Combo Shoe Machine Corporation. So I took care of those things and also some personal interests. And then in 1952 Mr. Hirsch invited me to join Hirsch & Company as a partner.

Q Did you make an investment?

A I did.

Q How much?

A $300,000.

Q Where did you get that?

A I inherited it.

Q All right, go ahead.

A I knew Mr. Hirsch, not terribly well but I knew him, but mostly I knew one of the partners who was a good friend of mine who has since died. So from 19 -- July 1st I guess, '52 I was in it, I guess you would call it the investment banking and brokerage industry until -- and with Hirsch -- until Hirsch was sold. The net assets were sold to duPont and--

Q All right, now stopping there. What did you do at Hirsch during your first years?

A Well, the first years I just -- I guess I butted in everywhere to find out what was going on and find out

something about it.

Q Did you have any customers? Did you have your own accounts? Were you able to produce business?

A No. No.

Q Did you have any experience in the accounting aspects of it?

A Not at all.

Q Did you have any underwriting experience?

A None.

Q Could you put deals together?

A No.

Q Did you ever put any deals together?

A No.

Q So what you really did was watch.

A Watched my money, tried to learn something about the business and tried to contribute whatever I could in a broad business approach.

Q All right. Did you ever take on any specific function there?

A Yes.

Q When was that?

A I think it was several years after I joined the firm they gave me the commodity department to be the partner in charge of that.

Q Did they have much of a commodity department?

A Fair but we had a manager, a professional, experienced man.

Q Did you get caught in that salad oil thing?

A It is a long story, but, no.

Q All right. After the commodities what did you do?

A And then I then became the manager-- the partner in charge of our foreign branches of which Hirsch & Company I guess for over 40 years close to 50 -- 40 years certainly had a very good standing in Europe, and so I had those departments under my wing. Naturally every office had managers and we had a manager in New York as a coordinator. But we felt that a partner should be involved and know what's going on.

Q When did you become "back office partner"?

A I don't think I ever was a back office partner. I was interested--

Q Four people have called you the back office partner. Under oath.

A Well, maybe -- pardon?

Q Under oath.

A Well, I never considered myself a back office partner. I was interested in the back office, that is true.

Q Well, wasn't Mr. Weil responsible to you?

A Mr. Weil, I think I heard him say he was responsible to me but I felt that he was responsible to-- either to myself or Mr. Kohns.

Q Did you work in the back office physically?

A No.

Q Did you work back there with the computers?

A Oh, no. I would visit and see what's going on.

Q Now you knew what ratio was, didn't you?

A Ratio being the AI?

Q Yes.

A Well, I heard the expression.

Q You knew what it meant, didn't you?

A Yes, I did.

Q You knew that it meant so much debt and so much capital, didn't you?

A Yes.

Q And you knew what haircuts were on capital security?

A Yes.

Q And you knew what allowable assets and unallowable assets were for purposes of -- for 325 purposes?

A Well, I am getting a little deep on that.

Q All right. And you knew what differences were?

A Yes, indeed.

Q And you do remember the back office crush?

A I do.

Q And the creation of differences and fails?

A Yes, I do.

Q And these were all terms that you knew the significance of?

A Yes. Yes, I did.

Q When was the first time that you got involved in the idea of merging Hirsch with some other company?

A I think my mentality being a businessman I am always open to any kind of a proposition at any time in any year. I can't say in particular it was just in '69. I am perfectly prepared to listen to any kind of a proposition.

Q I am talking about a serious merger question.

A A serious one I think came up in '69.

Q Would you tell the court the reasons that operated on you, that is your reasons in particular rather than the firm's reasons or any institution --

A Well, my personal reasons were this, I wanted to again get out of business. I had 18 years of working after having once retired. I felt very strongly in trying to analyze where the industry is going that one has to have either a very large firm or perhaps a very personalized firm where it is a customer's man kind of business and the

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middle sized firm which Hirsch more or less fitted into would not be the way of the future. The supermarket, in other words.

Q I am going to jump ahead a little bit and into the spring then we will come back. Do you recall a time coming when these losses started to appear?

A Yes, surely.

Q And do you recall also that you had -- do you recall this discussion that the firm, unless the market changed, the firm would either have to cut back, retrench and become a very small firm or merge with some other firm?

A Conversation with whom?

Q Mr. Kohns or Mr. Hirsch.

A Well, I always was pushing for doing something, either expanding or merging if possible on the same side so that we would come up with a good sized firm or reducing the firm in size.

Q Did you and your partners, and you in particular, have personal resources that could have sustained the firm as a small firm?

A Oh, yes.

Q Very small firm.

A Oh, yes.

Q Just a personal operation.

A Yes, except I was not a producer in sales.

Q No, but as--

A As far as capital is concerned I think so.

Q So that were you at any time concerned that the firm would be wiped out--

A No, never.

Q -- or get into trouble?

A Never. We were never near that.

Q Now going back to the earlier discussions, did you in fact consider two or three merger opportunities and reject them?

A We did.

Q And did you feel under any pressure to make a merger that spring?

A No. No -- we are talking now in '69?

Q Yes.

A No, not at all.

Q And getting into the spring of '70 were you under any feeling that if it wasn't the duPont firm it would be Hirsch down the tube?

A Not at all.

Q Now tell us about your first meetings with the duPont partners.

A Well, the first meetings as I recall began

in '70, and I think as I stated in my deposition that I spoke to Chuck Rousselot who was one of the senior partners at duPont. We had lunch together to see if there was any possible way that we could get -- there would be a good fit for the two firms. I felt we had something to offer, and Rousselot said that he had talked with his people, he came back and said we are not interested. Fine. Forgot it. Then some time thereafter, and I can't tell you how long thereafter, but a fair amount of time, he came back, called me and I think by that time Mr. Framen and Mr. Latour in some way had gotten together and we met. And it was on that occasion I think I met I believe Wally Latour which I hadn't known. In fact I didn't know anybody at duPont except Mr. Rousselot.

Q I presume you attended a meeting at your home?

A Yes, I did.

Q Do you want to tell us anything about that meeting? Do you want to give us a version or your version of that meeting?

MR. CAMHY: If your Honor feels this is cumulative I will skip by it. I don't know that it will differ but it might.

THE COURT: Well, if it is any different than Mr. Kohns' recollection just tell us.

THE WITNESS: No, not that I recall, your Honor. I think substance it was certainly similar.

THE COURT: All right.

T4a BY MR. CAMHY:

Q Now what happened after that?

A I think after that meeting there must have been some crossing you know in the sense of some of our partners I believe were talking to some of the other partners at the other firm to see where this thing would fit together. Then because of that -- nothing being secret, it came out in the newspapers, or in the newspaper -- I didn't see this article although I heard about it and I think it was on a Friday if I am not mistaken and Mr. Kohns called Wally Latour and told him the thing is off. I took a plane that night and went to Europe because it was a very serious matter for Hirsch and Company because he had a very strong international professional banking business. No public business. And the managers overseas were very much concerned of no longer being Hirsch & Company which they had been for upwards of 40 years. And some of the banks were asking questions, what's going on in and with that I went to Europe and tried to calm them down.

Q Now before that trip had you received any comments from Mr. Norman about the transaction?

THE COURT: Well, before you leave that. Do I understand your testimony that after the newspaper article appeared you then as a result of it took the trip to Europe?

THE WITNESS: Yes. That night. That night.

THE COURT: All right.

BY MR. CAMHY:

Q Had you received the comments from Mr. Norman about it?

A Frankly I don't recollect because of this before and after business of which --

Q Do you remember his telling you something like, who needs this?

A I don't know whether he told it to me then or later.

Q But you remember something like that?

A Oh, surely. Oh, certainly.

Q And do you remember talking about it to Mr. Gariboldi?

A Certainly.

Q And do you remember Mr. Gariboldi pointing out to you that they had securities account differences?

A Negative effects.

Q And you knew then too that duPoint was in relatively tight capital, over 1,500, right?

A I did not. I personally did not. I of course was approaching this whole matter in another way. I was looking to see that if we made any kind of an arrangement, deal with a firm such as duPont it would have to be where we would sell out. I don't happen to consider that what-- I personally don't happen to consider what we did a merger. We sold, in my eyes, we sold our assets, we disposed of our liabilities, known and unknown. I think on the unknown liability part as I recollect it now, I haven't looked at the agreement in five years, the spirit of it was I believe that if there were any unknown liabilities that exceeded I believe $35,000, any one unknown liability that that would be Hirsch's responsibility. We had no hesitation to accept that because we felt that we were on top of our business sufficiently to recognize that we don't have $25,0000 liabilities, and certainly not of any -- anything that we could see. So we--

Q All right, let me go on. Did a time come when you had a conversation with Mr. Petrillo that you can remember?

A Yes.

Q Do you remember it in any detail? If not I won't press it. Either is it a real recollection or not. First can you fix a time and place?

A No -- well, the place I know, it was at Hirsch.

There was nothing that Mr. Petrillo did or said to us, to me, that would discourage this, or that it wasn't good for Hirsch because that was the key question that I was interested in.

Q And you had been exposed to him at least two or three times during that period I gather?

A Exposed to him --

Q Mr. Petrillo. That is you had seen him about it or discussed it in one way or another?

A Several times.

Q And at no time did he try to warn you against it?

A At least -- no, I didn't get any warning signals.

Q And that's about the best fix you can put on whatever you had with Mr. Petrillo on that spring?

A That's right.

Q After the merger do you recall receiving this capital request from the exchange?

A I don't recall it but I heard the testimony today so --

Q Well, did you see those letters that were shown to you on deposition where you were reminded that you had to raise capital and you signed off on it?

A Yes, I -- I have to see them again.

t4b pm

THE COURT: Well, I think we will postpone that until tomorrow.

Ladies and gentlemen, I have two matters tomorrow morning. I start at 9:45. They will take about a half hour. So you have 15 minutes extra. Until 10:15 tomorrow morning.

MR. CAMHY: Your Honor, may I -- your Honor, I am trying to locate expert witnesses and I don't mind telling the Court that I am having my difficulties. I don't know whether I can have them here tomorrow, and I would like your Honor's indulgence. You mentioned that this would break on Tuesday and start again the following Monday. If I can't have one here tomorrow may I have him here the following Monday?

THE COURT: You mean after you finish with Mr. Mundheim you are going to your expert witness?

MR. CAMHY: No, Mr. Hirsch and then five minutes with Mr. Lill and not very long with Mirsch either. Mostly Mr. Hirsch will be put up their for cross examination. What I say if I have my expert tomorrow I will put him on and if I don't what I would like is another week to try to get one.

MR. POLLACK: If your Honor pleases, it was my understanding that no expert was either identified or even adverted to in the pretrial order.

MR. CAMHY: I think at our conference I did suggest that I might have one and I don't mind telling your Honor I am having trouble finding anyone who could take the stand against these defendants.

THE COURT: How long, Mr. Brooks, assuming that -- how long will your case take?

MR. BROOKS: I would hope to make a motion at the end of plaintiffs' case.

THE COURT: I know, I am sure you are going to make a motion at the end of plaintiffs' case but the likelihood of it being granted is dim.

MR. BROOKS: I think I couldput my case on in 45 minutes. I am prepared to do it tomorow.

THE COURT: And you, Mr. Hyde?

MR. HYDE: If I put on any case, your Honor, it will be equally long.

MR. BROOKS: I have a problem producing Mr. Bishop, your Honor; he is about to start a month's vacation.

MR. CAMHY: The expert witness would only be offered against Haskins & Sells.

THE COURT: Well, I suppose since I will not be sitting for the rest of week I suppose that under those circumstances,Mr. Brooks, if you are agreeable, we will have to take Mr. Bishop out of order.

MR. BROOKS: That is all right with me as long as counsel is willing to stipulate that the expert's testimony is only admissible against Haskins & Sells.

MR. CAMIY: Well, there are two kinds of experts. One would be against Haskins & Sells; the other would be as to damage.

So I don't think it would affect Mr. Bishop either. Neither would affect anything that Mr. Bishop --

MR. POLLACK: Your Honor, I respectfully suggest that this is not an appropriate case for experts. I renew the point that I made several moments ago.

THE COURT: I am inclined to agree with that, Mr. Pollack. I really don't know what experts could do in the matter but we can argue that out if they are produced.

It appears to me as I understand the case, the question is whether or not the information which has been claimed to have been whether he was known or should have been knwon to the plaintiffs who I must regard as being sophisticated businessmen. It seems to me that is the issue. I don't know how experts can help me to solve that problem.

We will resume at 10:15 and we will work it out tomorrow.

MR. CAMIY: Thank you, your Honor.

(Adjourned to June 24, 1975, at 10:15 a.m.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Paul L. Kolms (Resumed)		721	864	
Thomas L. Weil	874	882	903	
Marshall Mundheim	905			

EXHIBIT INDEX

	Identification	In Evidence
Defendant Haskins & Sells		
V		721
G		722
W		863
Plaintiffs		
260		723
243		862
243 (withdrawn)		863
225		870
9		874
Defendant New York Stock Exchange		
G		722
U	723	758

EXHIBIT INDEX

Defendant New York Stock Exchange	Identification	In Evidence
X, Y		744
W		760
FF, GG		769
DD, EE		770
CC		784
HH		785
J		808
I		819
JJ		833
KK		841
K, L		843
N		848
N-1		850

cmr 926

HOWARD C. HIRSCH, et al.

vs. 72 Civ. 775

HASKINS & SELLS, INC., et al.

June 24, 1975
10:15 a.m.

Trial resumed.

- - -

MR. BROOKS: Your Honor, before we begin I would like leave to submit a supplemental trial memorandum to your Honor to cover a point that we had neglected to cover in our initial memorandum and which I believe the evidence has made relevant.

MR. SPINOGATTI: Your Honor, one other minor matter before we start. Yesterday there was an agreement among counsel that we would look at the profit and loss figures for Hirsch & Company for 1968 and read into the record certain items and I have done so and would like to read them into the record at this time.

THE COURT: All right.

MR. SPINOGATTI: The profit from operations for Hirsch & Company for the year ending December 31, 1968 was $2,613,582.03 and net income distributed to partners for that same period was $2,085,211.65.

THE COURT: Mr. Mundheim.

M A R S H A L L S. M U N D H E I M, resumed.

MR. CAMHY: Your Honor, in order to save time I am going to strike the last question which calls for some documents that we don't have.

THE COURT: All right.

MR. CAMHY: We'll get back to it.

THE COURT: All right.

DIRECT EXAMINATION CONTINUED

BY MR. CAMHY:

Q Mr. Mundheim, prior to the merger were you ever informed that as at the audit date Haskins & Sells had computed duPont's capital at a $6.8-odd million deficiency and a 3,200-odd ratio?

A No.

Q Did you ever see this computation? (handing) At any time prior to the merger.

THE COURT: Give us an exhibit number.

MR. CAMHY: Excuse me. It's Exhibit 109.

A No, I didnot.

Q Prior to the merger had you seen that brochure which is the duPont annual report for the year end December 31, 1969?

A I believe I saw the brochure.

Q The one with the pictures in it and all that?

A Yes, I think I did.

Q Do you recall anybody suggesting to you that spring that the Haskins & Sells clean certificate for duPont had been revoked or should have been revoked or wasn't properly given?

MR. HYDE: Objection, your Honor, on the grounds of leading the witness.

THE COURT: You are leading, but I will allow the question.

Q Did you observe when you noted the brochure that Haskins was their auditors as well as yours?

A Yes, I did.

Q And di d you have any reason to question that they were in any kind of a problem with Haskins?

A No.

THE COURT: I don't understand that. I don't understand that question. All right, I just

indicated that I don't know what you mean.

Q Did you have any reason to question that Haskins had given the usual clean certificate on their audit?

A No, I did not.

Q Did anybody make it known to you that the exchange had reviewed the situation as at the audit date and assessed additional capital charges of approximately $8.1 million?

A No one told me. I was unaware of that.

Q Did anybody ever inform you that taking those additional capital charges into account the ratio at the audit date ran way into the tends of thousands?

A No, sir.

Q Did anybody ever inform you that the ratio as at the audit date by the exchange's subsequent computation resulted in a $17 million capital deficiency from 325 requirements?

A No, sir.

Q Did anybody ever tell you that the additional amounts assessed by the exchange were made good largely through the liquidation of differences, long differences in the differences account?

A No, sir.

MR. BROOKS: I object, your Honor, that mischaracterization is the evidence. The most that's been shown in the liquidation from the differences account is $6 million and Mr. Camhy has mentioned a $17 million deficiency.

MR. CAMHY: I will make it clear, Mr. Brooks.

Q Did anybody ever suggest to you that approximately $6 million of the deficiency had been made good by the liquidation of long differences?

A No, sir.

Q And you knew what long differences were, didn't you?

A Yes, sir.

Q Did you ever see a material inadequacies letter for duPont?

A No, sir.

Q Did Mr. Petrillo or anybody at Haskins & Sells tell youthat they had a material inadequacy letter for duPont which was substantial and significant?

A No, sir.

Q Getting to July of 1969, do you recall after the merger that the exchange communicated with the partners at duPont informing them that there would be an additional capital requirement that had to be met?

A Yes.

Q Do you remember signing what is Exhibit, I guesa it is New York Stock Exchange Exhibit L (handing)?

A This is my signature.

Q During the latter part of the summer and the early fall of 1970 --

MR. CAMHY: Excuse me, your Honor, that may be incorrect in the record in previous questions and I won't take the time now to have it read, but I want to save time when I pick up the transcript --

Q During the summer and fall of 1970, you understand that we are talking about the summer and fall of 1970 and that that last document which you signed was in the summer of 1970, is that correct?

A Correct.

Q Do you recall that in the summer and fall of 1970 there was additional requests and indeed demands by the exchange that the duPont Glore Forgan firm raise more capital?

A I do.

Q And do you recall that efforts were made in the firm to try to raise that money?

Well, let me ask you this: What do you know about what was being done to raise that money?

In any discussions that existed that I attended Mr. duPont, Edmond duPont, very clearly forbade anyone to occupy himself with the seeking of additional capital other than he himself as that he considered, as he told me, told us, that was his responsibility.

Q Can you describe conditions at duPont during the latter part of September and October and November of 1970?

THE COURT: Would you read that answer back before this last question?

(Question read)

THE COURT: I am sorry, Mr. Mundheim. Somehow I got confused because I thoughtyou said Mr. Hirsch and I was wondering what that had to do with 1970.

All right, thank you.

MR. POLLACK: If your Honor please, we did not at this table hear that answer clearly. Might we have the reporter read it quite loud to us, please?

THE COURT: Surely.

(Answer read)

Q First, do you remember that the audit was in progress?

A Yes, I do.

Q And what was the effect of that on the

operation?

A Well, there were an awful lot of auditors in from Haskins and sells,and everybody was busy doing their particular function to assist the auditors.

Q Did you know that there were seious capital problems at that time?

A It was -- yes, I knew there were capital problems.

Q And did you know that thematter had focused on the question of these differences?

A No, I did not.

Q What would you describeas the morale of the organization during the latter part of October and November?

A The morale of the organization, as I saw it, was quite low, because there were auditors in, I believe there were special teams, or groups of people either in from the exchange, or the exchange was in there constantly, and I think the organization knew something was astir. It was not a normal atmosphere.

Q Did a time come when you tried to withdraw your money from the firm in accordance with your contract rights?

A Yes.

Q And did you do that in writing?

A I did.

Q Tell us what happened after you did that.

A As I remember I sent a letter dated, I believe, December 3, 1970, which was practically the earliest date in which I could so do, advising of my desire to withdraw as a general partner and that I would like to withdraw my funds. And I believe a general partner and a limited partner, I believe. Withdraw my capital as of the end of the year 1970.

Q What happened after you sent the letter?

A After I sent the letter, some days later, I received a telephone call from Mr. Lasker who was the chairman of the board of governors of the New York Stock Exchange telling me that he would like to come over to see me in my office along with Mr. Haack who was the president of the New York Stock Exchange.

Q Now, prior to the call were you aware that Edmond duPont was conducting negotiations with Mr. Ross Perot, of Texas, about the refinancing of duPont Glore Forgan?

A I was aware of it only towards the end of, I believe the end of November, 19 70, because Mr. duPont called a meeting of a group of partners, and I believe

located only in New York as I recollect it at least, in which he told us that he had negotiated with H. Ross Perot and his group.

Q Now, in that connection had you ever heard the name Meyerson? In connection with Mr. Perot?

A Yes, Mr. Meyerson is the name I had heard of.

Q After you sent your withdrawal letter did you hear from Mr. Meyerson?

A Yes, I did.

Tlb

Q And did you hear from him at or about the time you heard from Mr.Lakser or a little bit beforehand?

A I don't know but it is certainly within that time frame.

Q And could you tell us the substance of your call with Mr. Meyerson?

A He came to see me and talked to me about why did I want to withdraw, etc., etc., etc., and he didn't think I should and so forth.

Q Now, Mr. Meyerson was associated with Mr. Perot, was he not?

A He was as I recollect it. He was put into duPont by Mr. Perot. I can't tell you whether he was on the payroll of duPont but he was in the firm as his representative.

Q Now getting to the call from Mr. Lasker, what did you say his position was?

A Mr. Lasker was the chairman of the Board of Governors of the New York Stock Exchange.

Q And Mr. Haack was the president of the exchange?

A Was the president of the stock exchange.

Q Now you tell us about the conversation you had with Mr. Lasker.

A Well, when he suggested coming over to see me at my office I felt that it wasn't the proper thing for them

to do and I said I would come over and see him. I went over after the close of the market to Mr. Lasker's office and I met with him and Mr. Haack.

Q Could you tell us the substance of that conversation?

MR. POLLACK: Objection, your Honor. I believe that the line of inquiry now does not relate back to what the condition of the firm was at the time that plaintiffs had their transaction of July 2nd pursuant to which they acquired interest in duPont. Although it does not affect our clients directly it seems to me to considerably expand the scope of this case beyond that which is pleaded or which has been the subject of inquiry to date.

MR. CAMHY: Your Honor, there has been a contention by the defendants that the leaving of the money in in December constituted kind of a voluntary waiver or innovation for which they are not responsible and that defendants made a conscious decision to take a chance that December and should be bound by it and in effect we lease, or waive whatever claims they might have had. And my object in adducing this testimony is to show that defendants' efforts in December and thereafter was salvage, that is to say, they were doing the best they could to get their money out of this firm and that it did not have anything to do with a desire on their partto stay in the firm, they

were in a bad situation and they were doing the legitimate salvage that a person does whose gotten into a loss situation.

MR.POLLACK: Your Honor my understanding of the case being presented to this court is quite simple: Did Haskins & Sells or the New York Stock Exchange fail to disclose information in connection with the July 2nd merger or did they make misstatements in connection with the July 2nd merger which were acted upon by the plaintiffs. The conversations of December, 1970, with Mr. Lasker do not relate back and are extremely irrelevant to the issues being tried.

MR. CAMHY: Your Honor, they are relevant to the defense raised by the defendants that we lost our rights by having left our money in. And I have to show --

THE COURT: Mr.Pollack, quite frankly I thought that this testimony was going to relate to something else in respect of the New York Stock Exchange rules and regulations and the manner in which they --

MR.CAMHY: It also relates to that, your Honor.

THE COURT: All right. But nonetheless it does appear to me that this could go to the question of damages so that the objection is overruled.

BY MR. CAMHY:

Q I gather you went over and saw Mr. Lasker and Mr. Haack?

A I did.

Q Would you tell us the substance of that conversation?

A Well, the substance was that they were doing everything they could to induce me to leave my capital in the firm and they indicated to me that if I didn't choose to do so it was likely that Mr. Perot and his group would not put fresh money into the duPont, Glore, Forgan affair.

Q Did you give them a response at that time?

A I gave no response to their request as I felt that I didn't -- I was shocked to hear this and to learn that the top two men of the exchange are bothering, let's say, with me. And I said I'd like to discuss this with my attorney. And they said, well, let's do it right away. So as I recollect I called my attorney and we set up a meeting for maybe two hours later at the attorney's office, and that was the last of the meetingat-- I made no comment and took no decision of any sort as I couldn't without my attorney.

Q When you went to your attorney's office was there a meeting there?

A There was a meeting there.

Q The same day?

A Same evening.

Q Same evening.

A It was two hours after the meeting at the stock exchange.

Q Who was present at the meeting?

THE COURT: Well, I don't think I need that. I think that for your purposes it is sufficient for us to find out what he did. I don't want any conversation with his attorney.

MR. CAMHY: Well, there were things said to him by the exchange your Honor, which go directly to the question of whether he had any choice but to leave his money there.

THE COURT: I thought this was with his attorneys.

MR. CAMHY: No, no. His attorney happened to be present but the otherswere there, Mr. Lasker was there and --

THE COURT: Oh, I'm sorry.

THE WITNESS: Yes.

THE COURT: I thought you were talking about a meeting that he had with his attorney.

MR. CAMHY: No.

THE COURT: This is another meeting --

MR. CAMIY: The same day Mr. Lasker and Mr. Haack ran up to his attorney's office and they had another session.

A We had a meeting there which was attended --

Q Tell us who was there up at the lawyer's office.

A At the lawyer's office there was Mr. Lasker, Mr. Haack, Mr. Meyerson, the Perot representative, I believe Mr. Hart who was also a Perot man, I think he was the president of EDS.

Q Was that Electronic Data Systems?

A Electronic Data Systems.

THE COURT: This was at your --

THE WITNESS: At my lawyer's office.

A Also present was -- in the office -- was Mr. Kohns, Mr. Hirsch and Mr. First. And then another man from the exchabge, and I am not sure whether it was Mr. Rohayton--

Q Felix Rohayton.

A Or Mr. D'Annunzio.

Q Were they officers of the exchange or governors?

A I believe both were governors but I am frankly not certain.

Q Did you know how Mr. Kohns and Mr. Hirsch got there?

A No, I don't.

Q Did you invite them?

A No.

Q You were surprised to see them there, weren't you?

A I was surprised.

MR. BROOKS: I object to leading questions.

THE COURT: All right.

A I don't know how they got up there.

Q Someone evidently had summoned them up there too, hadn't they?

MR. BROOKS: Objection.

THE COURT: All right, objection sustained.

T2a

Q Would you tell me what was said and who was present during the conversation, I gather some people were in the conversation and some people were out?

A In the conversations that I -- in the conversation with Mr. Haack Mr. Lasker and this other gentleman, either Mr. D'Annunzio or Mr. Rohatyn. And I was told--

Q Were Mr. Kohns and Mr. Hirsch there?

A They were not.

Q They were outside?

A Yes, they were outside.

Q Was your lawyer there?

A I believe -- yes, Mr. Fuld I believe was there. I was told in very direct language that I couldn't get my money out whether I wanted to or not because the money wasn't there, and that Mr. Perot would not put any money in unless Hirsch money -- and he started with me -- was left in.

THE COURT: Who told you that?

THE WITNESS: Mr. Lasker, I believe, or Mr. Haack. But it was --

THE COURT: It wasn't told by any of the representatives of Perot?

THE WITNESS: They were there, your Honor, and-- well, at a later date-- so this shocked me frankly when

I heard this.

THE COURT: Well, what I am really trying to find out is where it came from. It came from the members of the stock exchange?

THE WITNESS: I am vague on that, sir.

THE COURT: All right.

THE WITNESS: It may have come from Mr. Meyerson or both, or at least it was corroborated.

THE COURT: All right.

BY MR. CAMHY:

Q Did Mr. Haack or Mr. Lasker try to impress you with the seriousness of the consequences of Mr. Perot not putting his money in?

A Yes, indeed. Because it was said, and I can't tell you just which person said it, but it was indicated to me that a great deal of effort and a great deal of work had gone in on this duPont matter by the exchange-- I am using the exchange in the sense of the people involved-- that they were not -- they weren't going to see this thing go down.

Q Did they tell you what the implications were if it went down?

A The implications were that duPont would be out of business.

mh3 Mundheim-direct

Q And what else?

Q And then as this industry is a domino industry of the receipts and deliveries to other brokers there is just no telling how far spread this kind of a tragedy can be. We went out of the room to talk -- I talked to my attorney, and he said there is nothing you can do. You can't get your money according to what they tell you. And you are-- I am going to have to make the decision of whether I want to pull this house of cards down or not. I then decided that I would make a -- try to find a compromise and came to the conclusion that if I were given 25 per cent of my capital promptly on due date that I would leave 75 per cent of it in forgetting what the form is, but always as subordinated. Mr. Hirsch and Mr. Kohns as we were outside of the room with the others went along with this idea. I went back into the meeting with Mr. Meyerson, Mr. Haack, Mr. Lasker, etc. and told them of my suggestion and they didn't think it was acceptable. Well, I said, that's it or nothing. At that point either Mr. Meyerson or Mr. Hart went out of the room to contact, they said, Dallas, Texas, which is the headquarters of Mr. Perot and so forth. Anyway I don't know whether they did or they didn't but they came back into the room and said that that was acceptable.

Q And was this the agreement in principle which led

up to the December written agreement which is in evidence reflecting the decision of certain of the Hirsch partners to leave their money in?

A Yes, it is.

Q I believe that's the agreement of December 14, 1970, which is Plaintiffs' Exhibit 7 in evidence. I show you Plaintiffs' Exhibit 4 and ask you whether this is the letter which you sent to the duPont firm seeking to withdraw your capital (handing).

A Yes, this letter of December 3rd.

Q December 3rd.

A Yes.

MR. BROOKS: Your Honor, I believe Mr. Camhy made a mistake when he identified the December 14th agreement as Plaintiffs' Exhibit 7. We don't appear to have a 7 on our list but we do know that it did go in yesterday as Exchange Exhibit N.

MR. CAMHY: Exchange Exhibit N?

MR. BROOKS: That's correct.

MR. CAMHY: That's all right with me, your Honor.

THE COURT: There is another, a plaintiffs' exhibit that --

MR. CAMHY: Yes, but Mr. Brooks is right, your Honor. I offer Plaintiffs' Exhibit 4 in evidence.

MR. BROOKS: No objection.

MR. HEIDELL: No objection.

(Plaintiffs' Exhibit 4 received in evidence.)

BY MR. CAMHY:

Q Now, subsequent to the agreement in December did you receive a formal subordination agreement of the kind that's filed with the New York Stock Exchange covering your subordinated account at the firm?

A Well, I don't particularly recollect it, no.

MR. CAMHY: Your Honor, I am in a position to identify this and I offer it as being the formal subordination agreement which was executed and filed with the stock exchange.

MR. BROOKS: I object. Insufficient foundation.

Q Mr. Mundheim, can you identify your signature here? Is that your signature on here?

A Yes, this is my signature.

Q And it is an agreement dated as of the 4th day of January, 1971. Which is Plaintiffs' Exhibit 10.

I offer it again.

MR. BROOKS: No objection.

MR. HYDE: No objection.

(Plaintiffs' Exhibit 10 received in evidence.)

Q Did the time come several months after this

decision, and I direct your attention to October 7, 1971, when you received a communication from the successor corporation, duPont, Glore, Forgan Incorporated which purported to disclaim any obligation or further obligation to you on the subordinated account (handing).

THE COURT: Well, are we going to end up did the same thing happen --

MR. CAMHY: Yes, it is the same thing.

THE COURT: Well, can't Mr. Brooks and Mr. Hyde, can't you concede that and stipulate this testimony is in as to what occurred, and Mr. Kohns testified about it yesterday? I really don't see any reason in our duplicating this testimony.

MR. HYDE: Your Honor, I believe the documents are the same.

MR. CAMHY: They are.

MR. HYDE: The various parties received the same form of documents.

MR. BROOKS: Yes, we will stipulate to that.

MR. CAMHY: All right, may we have just Exhibit 11 in evidence please?

THE COURT: All right.

xx (Plaintiffs' Exhibit 11 received in evidence.)

MR. CAMHY: That concludes what I have, your Honor.

You may examine.

THE COURT: I don't think I heard what Mr. Mundheim received in settlement but I assume it was all the same, wasn't it?

MR. CAMHY: I think it is but it is slightly different in time.

Q You got that first payment right away?

A I received $225,000 in a certified check dated January 31st give ortake a day or two.

Q Did you and Mr. Kohns also receive certain salary benefits from the partnership or new corporation, or certain office facilities benefits?

A Of the new corporation which was formed much later?

Q Yes.

A I received no office facilities per se, or per contract. I was paid the non-competitive--

Q Covenant not to compete?

A The covenant not to compete of 25,000 a year plus a consulting agreement at the rate of $30,000 per annum.

THE COURT: All right.

Q But a time came when that was cut off too.

A At this time.

Q Same time.

A All cut off.

Q Was that true for Mr. Kohns as far as you know?

A No, I don't know that he had the same agreement as I had.

MR. CAMHY: All right, I may have to put that in, your Honor.

Q Now ultimately this matter with the corporation on the subordinated agreement went to litigation, did it not?

A That's correct.

Q And we represented you in that litigation?

A You did.

Q That litigation was settled?

A It was.

Q What did you receive as the proceeds of that settlement?

A To the best of my knowledge a hundred thousand dollars, but that's --

MR. CAMHY: All right. Your Honor, it is reflected in the pre-trial order. That concludes what I have, your Honor.

CROSS EXAMINATION

BY MR. BROOKS:

Q Mr. Mundheim, according to the figure Mr. Spinegatti put into the record this morning for the year 1968 the profits

and the figure that was put in during Mr. Gariboldi's testimony through exhibit -- I am not sure which exhibit, but at some point in the record we have a 2.8 million dollar loss for 1969, probably in Exhibits Q and R which are Haskins & Sells partnership income tax returns prepared for the firm of Hirsch & Company. The firm took a 5.5 million dollar swing in P and L between 1968 and 1969. When did you first become aware of that swing?

A I can't answer those questions. I don't know the figures.

Q I am just telling them to you.

A I --

Q Did you become aware --

A -- I don't know whether they are accurate or inaccurate frankly, Mr. Brooks.

Q Well, did you become aware of a very sizable swing between a high profit in 1968 and a sizable loss in 1969 some time in early 1970?

A I was aware that 1968 was a profitable year. I was aware that 1969 was an unprofitable year.

Q Were you aware that 1968 was the most profitable year ever for Hirsch & Company?

A I was only a partner for 20 years, or 18 years, so I am not aware of it.

Q You didn't hear any of your other co-partners who might have predated you at the firm say, by God '68 was the best year we ever had?

A I can't tell you what went on in the 1920's.

Q I am not asking you to tell me of your own knowledge but did you hear it said by any of your partners? In or shortly after 1968.

A I think the record -- I really don't know.

Q You don't know. Did you hear it said shortly after 1969 that that was the worst year Hirsch & Company had ever had?

A I can't say that I did.

Q Is it your testimony that you really weren't concerned about the profit and loss in '68 and '69?

A I was terribly concerned.

Q When did the merger discussions start with other firms?

A To the best of my recollection it was in '69. Early part of 1969.

Q Who was the first firm you discussed it with?

A I frankly don't know who the first firm was. We spoke with several-- a number of firms.

Q Did you discuss merger with the firm Neuber & Company?

A We did.

Q Robinson & Company?

A I heard that on the stand. I was not in the country at the time.

Q Did you know it as a fact from whatever knowledge--

A I understood there was somebody in Philadelphia that was discussed and dropped and I don't think I ever heard the name.

Q How about Bioren & Company?

A I think we had a meeting, one meeting with Bioren, or two meetings. Very small firm as I recollect.

Q Did you have merger discussions with Hentz & Company?

A Yes.

Q Did you have merger discussions with Kogan, Berlin and Weil?

A I did not but I understood that that was something at the suggestion of Mr. Petrillo if I am not mistaken.

Q I did ask who suggested it. I asked--

A I did not.

Q Did the firm of Hirsch & Company to your knowledge?

A It rings a bell.

Q How about American Securities Corporation?

A The name rings a bell.

Q In the merger context.

A I say it rings a bell, I don't know -- I had nothing to do with that. It never got upstairs as far as I am concerned.

Q How about Cohen and Simonson?

A Yes.

Q Bache & Company?

A I heard about it. I was not in the country at the time. I think there was one meeting as I understood or two meetings at the most.

Q Is it true that discussions with all these firms took place between some time in 1969 and the time of your first discussion with duPont which has been dated in early '70?

A I am not certain of that. Frankly --

Q At what end of that time period are you not certain?

A I am not certain of the earlier time period. Prior to '69.

Q Do you think there might have been merger discussions --

A There might have been, I am not certain.

Q How about Shearson Hammill, did you have merger discussions with them?

A Correct.

Q When?

A In the time period of 1969.

Q How about A.G. Becker & Company?

A That I don't know. Yes, there was a discussion. Correct. But I don't know when.

Q Would you say that the firm of Hirsch & Company was well managed?

A We think so. I think so.

Q And it was well managed it would be the result of the expertise of the partners and the employees under their supervision in Hirsch & Company, is that not correct?

A Yes.

Not necessarily the expertise of the partners but certainly the expertise of the employees.

Q Tell me, how long had Mr. Meyer been in the securities industry to your knowledge?

A He went back quite a while but I don't know how long. Certainly he antedated me considerably.

Q Did you consider him an experienced in the securities profession?

A In his field. He was not in the management end.

Q What end was he in?

A He was in the underwriting.

Q How about Mr. Katzenstein? Was he an experienced professional?

A Experienced professional? In his background as I remember it was in research and in the latter period as partner in charge of domestic branch offices, also had not been in general management.

Q How long had he been in the business, to your knowledge?

A As a partner?

Q No, just in the business.

A Well, in the business he antedated me.

Q How about Mr. Bach, did you consider him an experienced professional?

A Mr. Bach came to us as I remember it, I believe, I am not certain, without any experience in the industry, and went through various parts of the business and ultimately landed in the underwriting department under the supervision of Mr. Meyer.

Q Would it be fair to say, sir, that there were a number of experienced professional securities men who were partners at Hirsch & Company in and about 1969 and 1970?

A There were a number of experienced-- what was the word you used? Professional men.

Q Professionals.

A -- who were in my judgment professional in their areas, which were in my judgment limited areas.

Q Was there anybody at Hirsch & Company who was a professional in all areas who knew the securities business top to bottom?

A I suppose we would, out of respect for Mr. Hirsch I would have to say that he was in the business for many years and for Mr. Kohns.

Q In '69 and '70 you worked with Mr. Kohns very closely, didn't you?

A I did.

Q Pretty much as a team?

A He being the boss man and I working with him.

Q When he was away from the office who would run the firm?

A If there was a decision that had to be made I would be likely to take it.

Q You were in charge when he was away, isn't that correct?

A I would accept that.

Q To whom did Mr. Gariboldi report?

A Mr. Gariboldi reported to Mr. Kohns.

Q And to you?

A And I suppose indirectly to me.

Q Did he consult with you from time to time about the areas of his responsibility?

A My door was always open.

Q And he came in it once in a while, did he not?

A Whenever he wanted to.

Q That was not infrequently, was it?

A Not infrequently.

Q Mr. Weil was the same way, wasn't he?

A Certainly.

Q And Mr. Norman was the same way, was he not?

A Why not? Yes.

Q Did you ever put any more money into the firm of Hirsch & Company than that additional $300,000 that you testified you put in in 1952?

A It is a question of what you -- how you describe putting more money in. Hirsch & Company I am told -- let me put it thisway --

THE COURT: Told some of a policy of distributing all of the profits as to the partners and then the partner can bring back all or part of it as additional capital for the ensuing year. Hirsch & Company's policy was the reverse. We left our profits in the firm and therefore in that context the additional capital that I had in the firm came out of firm earnings retained after taxes.

Q Are you a member of the Hirsch liquidating committee?

A I am.

Q As such have you worked closely with Mr. Norman who has testified he was also a member of the Hirsch liquidating committee?

A I have.

Q Was it your opinion in the spring of 1970 that there had to be a dramatic reduction in the expenses of Hirsch & Company to meet the income that Hirsch & Company was accruing at that time?

A Had to be either a dramatic reduction in expenses or there had to be a dramatic up surge in the industry.

Q The problem was that expenses were way out of line with income, were they not?

A The results show that.

Q What was the cause of that?

A What was the cause?

Q Yes. How come in 1970 and '69 expenses are exceeding income by such a great amount while in 1968 we all agree that income was by far exceeding expenses? What happened in that interval?

A Well, do you want me to give you the history of Wall Street?

Q No, I would just like you to answer me in one or two sentences.

A Wall Street is a cyclical industry, and in '68 with a large increase in volume your expenses do not go up in proportion as your income goes up. Conversely when volume drops precipitously you cannot reduce your expenses accordingly. When we open our doors at 10 o'clock in the morning we don't know what the volume is going to be. We have to be there prepared to service it. We are dealing with the public.

Q As a result of the volume of '68, perhaps late '67, had Hirsch purchased or entered into long term leases for a lot of expensive electronic data processing equipment?

A As far as I know -- may I ask this question of you? What do you call a long term lease?

Q More than a year.

A Pardon?

Q More than a year.

A I don't know o f any landlord that will make a one year lease or would have made a one year lease. Yet we had longer leases than one year. We did not have in my terms long term leases.

Q What was the average length of your leases?

A I wouldn't know by memory but I would suspect

certainly less than ten years. I would think -- I don't know, I can't answer that, it would be a guess on my part.

Q As a result of the merger agreement that you --

A May I interrupt one second?

Q Yes.

A You asked about electronic equipment. As I remember it all the electronic equipment is rented from IBM, International Business Machines Corporation. And to the best of my knowledge there are no long term leases with them.

Q Well, the purpose of my question Mr. Mundheim was to find out what all these fixed expenses were that needed a high level of income to support them because that seems to have been the problem in the spring of 1970 and 1969. Can you tell me what those expenses were that simply couldn't be reduced?

A There is no such thing in my language as the word could not be reduced.

Q Well, why wasn't that the answer to your problem?

A What problem?

MR. CAMHY: I think I am going to object to the form of the last question. And move to strike the answer.

Q Why didn't you cope with the problem of a large loss in 1969 and a similar rate of loss in1970 by reducing

expenses rather than running around trying to find a merger candidate?

A If I remember -- that's a two-part question, is it?

Q Answer either way you feel comfortable.

A Well, I feel comfortable in answering you that the losses were not as you described in 1970 because the first quarter of 1970, as I heard testimony given here, was $125,000.

Q And you have heard some further testimony about April and May, have you not?

A I did. I did.

Q Well, taking those first five months together could you answer my question?

A Will you repeat the question, please?

THE COURT: I think, Mr. Brooks, that the record will establish that Mr. Mundheim, whether for reasons of 1969 or not was anxious he has testified to either reduce the firm in size or to merger it. I think that's his testimony. I don't know whether we need more than that.

MR. BROOKS: I will move on, your Honor.

Q Mr. Mundheim, yesterday you testified that under the agreement of July 2, 1970, which you have carefully pointed out was not a merger agreement but a sale of assets and assumption of liabilities I believe you called it, duPont was not obligated to assume any liability above $25,000. Was that your testimony?

A Any single liability.

Q Any single liability.

A Any single liability, and I don't know the legalistic terms, but any one claim, or any one liability. Any one liability that exceeded $25,000. We could have a hundred of them at 20,000 and they were duPont's responsibility.

Q How about the long-term leases, were they

obliged to assume those long-term leases?

A When the --

MR. CAMHY: I am going to object, your Honor. I think at some point we had better be a little bit more specific. There were leases -- you can have equipment leases, real estate premises leaseholds and --

THE COURT: I thought that the testimony was that except for the --

THE WITNESS: Unknown?

THE COURT: -- two years agreement with one of the employees that Mr. Kohns indicated that Hirsch would assume. The testimony here about a single liability of $25,000, I thought that the testimony was that all of the liabilities of the Hirsch firm of whatever magnitude were assumed by duPont.

MR. BROOKS: I believe this witness attempted to cut that down yesterday --

THE WITNESS: No, let me answer you -- answer your question.

MR. CAMHY: I just want one thing clear. I have no objection to it being shown in evidence that whatever the liabilities were duPont assumed them. What I am objecting to is the implicit suggestion throughout the question that there were substantial long-

term liabilities, etc., without showing which or how or what.

THE COURT: Well, I am telling you gentlemen for my purposes I don't know what you need in the record. It doesn't make any difference one way or the other, but, go ahead.

THE WITNESS: Let me answer you, Mr. Brooks. The liabilities were divided into two parts. Known and unknown. The known liabilities were I believe listed. And in that listing were the leases for equipment, for real estate and all known liabilities that we had. And I said that I want this agreement to contain in addition to the known liability the unknown liabilities.

And the unknown liabilities which at the moment of the merger were unknown to us therefore we could not divulge it to duPont, we said, and this is my recollection of a contract made over five years ago, that we would assume those and unknown liability that exceeded $25,000. Everything else was assumed by duPont.

BY MR. BROOKS:

Q All of those identified liabilities were assumed, whether or not they were over $25,000?

A Correct.

Q Why was it so important to you to have this lock, stock and barrel concept applied to the transaction?

A I had reached an age where I was reasonably in command, let's say, of a business along with Mr. Kohns, and I was not prepared to spend the rest of my life working in a business necessarily down the totem pole. So therefore, from my personal standpoint, if I was going to get out of business I wanted to be in the position ofmaking my own decisions whether I wanted to continue or not to continue. It was for this reason that I felt the way I did about the lock, stock and barrel.

Q How did the assumption of all liabilities by duPont support that desire?

A Pardon?

Q How did the assumption of all liabilities by duPont support the desire that you have just described?

A As I had been told that a partner has responsibilities o f an unlimited nature and therefore somebody has to assume them and that's why we transferred them to duPont.

Q Do youhave any recollection of what the total liability was for Hirsch & Company with respect to long-term leases?

A I haven't the foggiest idea.

MR. CAMHY: Objection. Move to strike.

THE COURT: Isn't that a matter of record in any event?

MR. BROOKS: Well, I don't know where that record lies, your Honor.

MR. CAMHY: It lies with whoever wants to prove it.

MR. BROOKS: I was trying to prove it by a question.

MR. CAMHY: I advised your Honor that it was in the omnibus account.

Q At any event the answer was the witness doesn't know so I am prepared to ask the next question.

THE COURT: All right.

Q Mr. Mundheim, did you ever receive a report from Mr. Gariboldi that on his anslysis the back office of duPont was in a mess?

A I never -- a verbal report or written report?

Q Either.

A Mr. Gariboldi, I heard him make the statement --

Q You heard him make that statement?

A -- make the statement that he had told me what he had found at duPont and my memory doesn't necessarily follow it word by word but I think in spirit and substance I would not disagree with what Mr. Gariboldi said.

Q I am asking you a more specific question, Mr. Mundheim, and that question is: Did Mr. Gariboldi tell you that the back office of duPont was a mess?

A I can't answer you in specifics, Mr. Brooks, as much as I would like to.

Q Well, you did on your deposition, so I am surprised --

A Well, then, if I did then, then I withdraw my comment now. In substance there is no disagreement.

Q In substance there is no disagreement with my question.

I believe you also described that Mr. Gariboldi was not enthusiastic aboutthe figures that he saw at duPont, is that a correct characterization?

A I think so.

Q In the spring of 1970, when you were negotiating with the duPont people did you know or come to learn that duPont was suffering continued operating losses?

A I believe so. I believe they were suffering-- I came to learn they were suffering losses. Now, whether they were continuing on a monthly basis that I don't know.

Q Did Mr. Weil ever make a report to you that if Hirsch were to merge with duPont the back office of the merged firm would take an awful lot of work to straighten out?

A It would not be an unusual remark to make.

Q Do you recall him making --

A I don't recall that, but I don't disagree with it now.

Q You do not.

A No. It's work.

Q And you knew that at the time, did you not?

A Pardon?

Q You knew that fact before July 22, 1970, did you not?

A I know that any merger is a lot of work.

Q Did you recommend that the merged firm of duPont Glore Forgan & Co. retain Mr. Gariboldi's services?

A Yes. I can't -- I don't -- let me -- yes, I think so. Recommend to whom, may I ask?

Q Anyone.

A That I can't say.

Q Can you say that you recommended it to someone?

A I am not sure whether I did, but I wouldn't have hesitated to do it.

Q Let me read to you from your deposition at pages 233 and 234:

"Q Did you make any recommendation in respect to employment of Mr. Gariboldi?

"A I made recommendations for all the employees at Hirsch.

"Q Did that include Mr. Gariboldi?

"A That included Mr. Gariboldi."

Does that refresh your recollection?

A Yes and in substance I don't think my testimony is different than what I made in the deposition.

Q It was somewhat less precise. Did Mr. Gariboldi accept employment at duPont Glore Forgan?

A No, he did not. As I recollect it even beforethe merger of duPont he had accepted employment elsewhere.

Q Do you know whether any investigation was made of Glore Forgan & Company which was the third

member of the tripartite merger that took place?

A Not on my part or not on Hirsch's part, as far as I know. The reason I hesitated, Mr. Brooks, is I am under the impression, but I am not certain, that the duPont Glore Forgan merger was a merger whether or not Hirsch merged into it. That's my impression. I am not sure legalistically.

Q But you did know at the time that Hirsch entered the merged firm of duPont and Glore Forgan on July 2 that the ingredients that had been attributed were partially from Glore Forgan, did you not?

A Yes.

Q You didn't know what they were, did you, those Glore Forgan ingredients?

A Not in detail at all.

MR. BROOKS: I submit to the clerk New York Stock Exchange Exhibit M marked for identification. And I hand Mr. Mundheim a copy (handing).

Q I ask you, Mr. Mundheim, if Exhibit M bears your signature on the next to last page and on the last page.

A It does.

Q Did you receive this form from Mr. Kohns shortly before July 2?

A I don't know where I received this form from.

Q Did you complete the form to the extent that there is information filled in in the blanks?

A Beg pardon?

Q Did you complete the form, supply the information that it called for and apparently is filled out with?

A Well, I must have supplied the information.

Q It's information about you, is it not?

A Well, as an example, was I known by any other name, and of course I never was and would have put the word "No" down.

Q There is some personal information here that only you would know, is there not?

A Such as?

Q Have you ever refused a bond by a surety company?

A That's correct.

Q That's right.

And only you could have supplied that information, isn't that right?

A Of course. I don't deny supplying it.

MR. BROOKS: I will then offer this in

evidence, your Honor.

MR. CAMHY: No objection, your Honor.

(Defendant New York Stock Exchange Exhibit M was received in evidence)

Q Mr. Mundheim, do you have a recollection of the mechanics of how the information was supplied to complete this form and who filled the form out?

A No, I don't. Most of it is rather factual anyway.

Q That's correct.

A And so any one of a number of people all knew all these answers.

Q When you signed, sir, did you read the form?

A I read the form to the extent of seeing that the blanks are filled in.

Q Correctly?

A To the best of my ability.

Q I mean you just didn't scan the blanks and see that there was no white space that someone had typed something in, did you? You ascertained that the information that had been completed in the blanks was correct as it pertained to you, did you not?

A Yes.

Q Did you realize at the time you signed

Exhibit 4 that it was an application and agreement to and with the New York Stock Exchange?

A It so states on the front page it's an application.

Q Right. And you knew that at the time, did you not?

A It says it.

Q Yes, and you knew it, having read that.

A Of course.

Q Is there anything in here that's not true, Mr. Mundheim?

A Would you be more specific, please?

Q Can you answer my question yes or no?

A I know what you are referring to and that's the clause marked "Important."

Q Why do you know that's what I am referring to?

A Because you referred to it inthe deposition.

Q Well, would you like to tell me what your answer is in respect to the clause in the box that's headed "Important"?

A Mr. Brooks, when one deals with the New York Stock Exchange --

Q Mr. Mundheim, I am going to suggest that my

answer can be answered yes or no.

A What was your question?

Q Is there anything in the form, now we have limited it to the box entitled "Important" that is untrue?

A I don't like the word "untrue," very frankly.

Q Well, whether youlike it or not I would like you to answer my question yes or no, unless his Honor thinks it's an improper question.

A This is a printed form. I signed it. I did not read it in its entirety.

Q Mr. Mundheim, can you answer my question yes or no?

A I don't know how to answer it frankly.

Q You cannot answer it yes or no?

A I don't know how to answer it.

Q Is there any statement in that box entitled "Important" which is not true and correct? If you can't answer that --

A I was not relying on the New York Stock Exchange to give me financial support on an investment decision by me.

Q Who were you relying on?

A I was relying on the New York Stock Exchange

that the firm in which I am making an application to join is a viable firm.

Q You were relying on them to do that.

A Of course, you would expect it.

Q Who --

A And I was also -- pardon me.

Q Who were you relying on to give you financial information in respect to your investment?

A In respect to my investment? The hazard of my investment is my problem.

Q Who did you rely on as a matter of fact to provide you with information in respect to the hazard of your investment?

A I relied on two organizations for the correctness, and that is Haskins & Sells and the New York Stock Exchange.

Q Who did you rely on to provide you with information in respect to your investment?

A I don't know what that means.

Q Well, who did you send out to do an investigation of the duPont firm?

A Mr. Weil I think went and Mr. Gariboldi.

Q Right.

A I don't know whether you call it an investiga-

tion because if a one or two-day visit is an investigation I do not considre it such.

Q We have heard the details of what those two gentlemen did.

A All right.

Q You relied on them, did you not?

A I listened to them and I made my own decision.

Q How about Mr. Katzenstein, did he supply any information which you relied on?

A To the best of my -- did he supply any?

Q Yes.

A I don't recollect it.

Q How about Mr. Bach?

A I don't recollect that. As far as I knew neither of them went to -- were at duPont.

Q Prior to July 2, 1970, Mr. Mundheim, did you have any communication with any officer , governor or employee of the New York Stock Exchange, excluding Mr. Framen, who was your partner, in respect to the proposed merger between Hirsch and duPont?

A Not that I recall.

Q You didn't ask the stock exchange for any information about the duPont firm, did you?

A Not that I recall. No.

Q Do you see in the middle of that box entitled "Important" wheer it states that included in the investigation that you made and as a part of it you had seen the September 28, 1969 audit of Haskins & Sells and a recent computation of net capital by the duPont firm dated April 30, 1970? Are those true statements, sir?

A I think those are part of the contract if I am not mistaken.

Q That you had seen those? That fact is part of the contract?

A They applied to us if I am not mistaken. I am not sure I saw them, but I know that they were supplied to the firm.

Q As a matter of practice you wouldn't have signed this form, Exhibit M, if those were incorrect statements, would you?

A If they were incorrect to my knowledge.

Q Yes.

A If the statements issued were incorrect, is that --

Q No, no, if the statement in the middle of that box entitled "IMportant" was not correct.

A I can't answer you whether I saw -- I can't

recall at this moment whether I saw the statement --

Q I appreciate that that is what you said and my question was as a matter of your practice you would not have signed a statement like this which recited that you had seen those financial statements if indeed you had not seen them, would you?

A As a matter of practice, no.

Q When you signed Exhibit M, Mr. Mundheim, were you aware that if you had made any misstatement in it the exchange reserved the right to withdraw its approval of you as a partner?

A Which is M, may I ask? Isthis M?

Q M is the only one you have before you.

A I see.

Q And I call your attention to the last page.

A Yes.

Q Paragraph with the No. 3 against it and the qualifying paragraph above it. The question is: Were you aware of that provision when you signed this agreement?

A I don't think I focused on it.

Q What does that mean?

A I don't think that I read all the fine print.

Q Is that print any finer than any other print

in that agreement?

A This is a -- yes, it's finer I guess.

Q It is?

A I don't know. I really don't know.

Q Well, I know it is smaller than "Important," but it's not smaller than --

A All right. I call that fine print.

Q I see. And you weren't used to contracts with print that size, were you, Mr. Mundheim?

A Contracts from whom?

Q Any one.

THE COURT: Mr. Brooks and Mr. Mundheim, let's move on. I can't credit the fact that you would not sign an agreement that you hadn't read.

Q Mr. Mundheim, at the time you signed that agreement were you aware that if you made a misstatement in that agreement the board of governors of the New York Stock Exchange would have had authority to suspend or expell you as a member or allied member, for a misstatement in that agreement?

A I can't say that I was aware of it.

Q Did you know that within the stock exchange system and under its constitution and rules, a misstatement to the exchange was considered a very

serious negative act on the part of any member of the exchange community?

A I can't say that I know it, but I accept it?

Q You would have suspected that at the time, would you not? The way things worked in the securities industry?

A That's correct.

Q Were there any misstatements in Exhibit M, to your knowledge, when you submitted it, sir?

A I think we are back to where we came in, aren't we? We are talking about the important clause.

Q Let's try it with a yes or no answer this time.

A The way I read that clause, or the way I read the parts that I read is that I relied -- I did not rely on the exchange for certain things but I certainly relied on them for others.

Q Then there is a misstatement in there, is there not?

A If you call it so.

Q Do you agree with what I call it?

A I don't.

Q No, you don't think there is a mistake in there?

A I personally don't.

Q When did you first get the idea that you had been taken advantage of in respect to the disclosure you had received about the duPont firm?

A Not too long after the effective date of the merger.

Q A month or so?

A Could have been anywhere upwards of two months.

Q Did you discuss it with Mr. Kohns and Mr. Hirsch?

A I think I would have discussed it with Mr. Kohns.

Q As a member of the securities industry for 20 years or so at this time, Mr. Mundheim, were you aware that if you had information that was misdisclosed or withheld you could have rescinded your agreement?

A No, I was not.

Q You were not aware of that. You didn't hear of that princple in your business dealings prior to coming to Hirsch in 1952?

A I don't think that the -- I didn't think of it. I wished I had.

Q Did you consult counsel at this time that you believed you had been victimized by the people who victimized you?

MR. CAMHY: I object to that. I don't think he said that he had been victimized.

THE COURT: Do you object to that term?

MR. CAMHY: I do object to that term, yes, your Honor.

THE COURT: My understanding is that it's a perfectly legitimate term in the context of this case.

Q Can you answer the question, Mr. Mundheim?

A The infomration that we saw on which the transaction was made did not fully disclose the facts as we found out at a later date.

Q Didn't you testify that you realized that you were duped within about a month or so after joining up with the new firm and that Mr. Forgan had either told you or one of your former Hirsch partners that he believed the same thing?

A That's correct.

Q Didn't you discuss with Mr. Kohns what alternative to pursue in light op this situation that you got yourself into?

A I could have and I wouldn't have any reason to not discuss it with Mr. Kohns and the alternative is a simple alternative which I took the minute I could do it.

THE COURT: Mr. Brooks, let's give the reporter a rest. Let's take a recess.

(Recess)

BY MR. BROOKS:

Q Mr. Mundheim, after you realized that all was not as well as you had thought it would be at the merged firm didn't you go out and try to raise some additional capital for the firm?

A There was a point in time when I asked I believe my wife or my children if they were interested in becoming subordinated lenders.

Q In the merged firm, is that right?

A In the merged firm.

Q And that was about a month or so after that demand by the stock exchange?

A I don't recollect. It's a matter of record. I don't recollect.

Q Where is that a matter of record?

A I think in my deposition I made some statement of that.

Q Would you stand by that, sir?

A I'd have to see what it is, but somewhere I recollect it, yes.

Q If I represented to you that you said you had asked your wife and daughter --

A That's right.

Q -- possibly your son --

A That's correct.

Q -- to put in money to the merged firm within 30 days after July 23, 1970, would that accord with your recollection?

A At this moment, no. The time element.

Q You mean you don't remember that day?

A I don't remember whether it's 30 days is my point.

Q Would you dispute that fact if that was what your deposition testimony had been?

A No.

MR. BROOKS: I will represent thatthat's what it was, your Honor, at page 333 and 335 of the deposition. I trust Mr. Camhy will inform us if he believes he reads to the contrary.

Q At your deposition, Mr. Mundheim, wasn't the only person that you could connect with the statement that you received in December to the effect that you couldn't get your money out of the firm because there wasn't any money there Mr. Meyerson? Wasn't he the only person you could attribute that statement to at your deposition?

A No.

Q No? Let me try to refresh your recollection, sir. Page 364 of your deposition.

"Q" --

MR. CAMHY: Your Honor, as I understood the direct testimony it's almost consistent with what Mr. Brooks just said.

Now, if that authorizes Mr. Brooks to read, I suppose he can read, but my recollection is that from the stand he said that certain people were present and he attributed that remark, he thought, to that gentleman, but it could have been from one of the others.

MR. BROOKS: If Mr. Camhy will stipulate that that is what the testimony is I will withdraw from this point and accept it.

MR. CAMHY: I thought that's what he said.

MR. BROOKS: That's what I think it should be.

MP. CAMHY: Mr. Meyerson was there and the others were there, somebody said it, he thought it was Mr. Meyerson, he couldn't be sure but he thought it was Meyerson, it might have been one of the others. In any case, that's the spirit of what was said in the presence of everyone.

THE COURT: All right.

MR. BROOKS: I accept that as the witness' testimony.

Q You were a member of the finance committee at the merged firm, were you not, sir?

A I was.

Q What were the duties of the finance committee?

A We used to listen to the reports made to the finance committee, when I attended, yes.

Q Did you attend regularly?

A I attended regularly when in the city.

Q When you were not in the city, I understand you were on firm business elsewhere?

A Yes.

Q What kinds of reports did the finance committee listen to?

A As I recollect it, it covered the longs and shorts and I think the -- I am not sure whether it had the AI in there or not. Idon't recollect --

Q You are not sure that the finance committee considered the problem of the capital ratio of the firm?

A Yes, I am sure it did. But I am not sure whether it was in tne report.

Q I see.

A That is my point.

Q Was this considered the top committee of importance at the merged firm?

A I don't know.

Q There is some question in your mind whether it was -- it ranged above some other committee?

A I think Mr. duPont ranked above all committees regardless of title of committee.

Q How about confining our question to committees, was this the most important committee?

A I suppose in vies of the financial problems of the firm you would have to say yes.

Q After the committee listened to reports did it do anything? Make any decisions, take any votes?

A There must have been. I don't recollect.

Q You are clear in your mind that this committee did more than simply listen to reports, aren't you?

A Yes, they had discussions.

Q It was a decision-making committee, wasn't it? It made decisions?

A I have to say yes to that.

Q At the time probably Mr. Meyerson told you you couldn't get your money out of the firm because there was no money there, was he a partner in F. I. duPont Glore Forgan & Co.?

A I am not aware that he was ever a partner.

Q Was he an employee of F. I. duPont Glore Forgan & Co.?

A I don't know on whose payroll he was.

Q You don't know?

A I know that he had a lot to say.

Q Well, he --

A He represented Mr. Perot.

Q Did you believe him when he told you you couldn't get your money out because there was no money there?

A I believed what Mr. Meyerson would say, yes.

Q You would believe that. When your lawyer told you thatit was your choice to make what did you understand him to be telling you?

A My understanding was to either leave in whole or in part capital in the firm so that Mr. Perot would put in his capital, or refuse to do so and take the responsibility that Mr. Perot would not put money in the firm.

Q Did you understand that if you exercised the latter alternative you could have walked away with your money?

A That's not what was said to me.

Q I didn't ask you that. Is that what you understood?

MR. CAMHY: I object to the form of the question.

THE COURT: I don't see any basis forthat objection.

MR. CAMHY: The witness has said that it wasn't what was said to him, then the question is is that what you understood when he just answered to the contrary that wasn't what was said to him.

THE COURT: Well, in any event the objection is overruled.

Q Would you answer the question, sir?

A Will you repeat the question, please?

(Question read)

A I did not under -- wait a minute. I understood that if I insisted on my money I would not get it.

Q Did you consider bringing any legal action, or arbitration proceeding at that time?

A At that particular time I was only addressing myself to one thing.

Q Up until the time you made the decision to keep your capital in in a different form.

A I hadn't given consideration to it at that time.

Q The subordinated form in which you did keep your capital in, sir, did not expose it to the risks of any further operating loss, did it?

A No.

Q Do you recall the rate of return that was provided for in the subordinated form of investment?

A No, I don't.

Q Was it a percentage above prime?

A I think that was a standard way and I would assume that it was that.

Q Turning your attention back to Exhibit M, Mr. Mundheim, which is the document in front of you, was it your custom to read printed material at the time you signed Exhibit M?

A Yes.

Q Did that apply to printed material put out by the New York Stock Exchange?

A Other than printed material?

Q Any printed material put out by the New York Stock Exchange such as Exhibit M.

MR. CAMHY: Your Honor, printed material, you are talking about printed material that he was asked to sign or --

MR. BROOKS: Yes, like forms. Forms. Like

that one.

A This is the only form that I remember ever signing since I joined 20 years ago. I don't remember particularly any other form from the New York Stock Exchange. I don't know. I would read it.

Q You would read it.

A Yes.

Q Didn't you tesify on your deposition that "If documents were printed forms put out by the New York STock Exchange and/or Haskins & Sells or any regulatory body or exchange I generally would not read them"?

A If that's what I said in the deposition that's what I said.

Q You said that at page 404 of your deposition. But I take it your testimony is to the contrary right now. That you would have read that kind of form and it would be your practice to read it.

A Yes. It's to the contrary.

Q One last item, Mr. Mundheim. Your counsel have produced for us your income tax return for the year 1971 and I ask you to tell us if that indeed is what counsel represented it to be (handing).

A It is.

MR. BROOKS: Your Honor, this has been

pre-marked as New York Stock Exchange Exhibit ZZZ for identification. I now offer it in evidence for the data that it provides in respect to the treatment of the loss, the amount of the loss claimed in respect to the investment which is sued upon.

THE COURT: All right.

MR. CAMHY: No objectoin.

(Defendant New York Stock Exchange Exhibit ZZZ was received in evidence)

CROSS-EXAMINATION

BY MR. HYDE:

Q Mr. Mundheim, I take it you are familiar with the term surprise audit, are you not?

A Yes.

Q Do you know what reports auditors are required to file in connection with wn annual surprise audit?

A No.

Q Have you ever heard of answers to financial questionnaire?

A I have heard the words, yes.

Q Do you know what it is?

A No.

Q Had you ever seen a financial questionnaire, answers to financial questionnaire?

A Not that I recall.

Q In your 18 years at Hirsch you never saw answers to a financial questionnaire?

A Not that I recall.

Q In your 18 years at Hirsch did you ever see a memorandum computing capital forrule 325 purposes?

A Yes.

Q Where did you see --

MR. CAMHY: Your Honor, I would like this made clear as to what is meant by a memorandum. That is to say, anybody's memorandum computing capital or an auditor's memorandum?

MR. HYF[illegible]. Let me pursue that.

Q Did you see any memorandum computing net capital for rule 325 purposes?

A I think only internal memoranda.

Q Did you ever see a memorandum prepared by outside auditors computing net capital?

A Not that I recollect.

Q Are you aware of the fact that outside auditors were required to file a memorandum computing net capital?

A No, I was not.

Q Are you aware or were you aware of the fact

thatoutside auditors were required in connection with an annual surprise audit to report upon any material inadequacies in the firm's accounting system, internal accounting control and procedures for safeguarding securities?

A May I have that again, please?

(Question read)

A Report to whom, sir?

Q To the United States Securities & Exchange Commissionand to the New York Stock Exchange?

A No, sir, I was not.

Q To either agency?

A No, sir.

Q In your 18 years of experience with Hirsch & Company did you ever have occasion to learn of the requirements of SEC rule 17A5 and its form X-17A5?

A I don't know what they are.

Q You have never heard of them?

A I have heard them mentioned here but I don't know what they are.

Q Were you aware of the fact that broker-dealers in securities were required to file annual reports with the Securities and Exchange Commission?

A No.

Q You never heard of a broker filing reports with the SEC in your 18 years at Hirsch?

A I never did, no.

Q Did you ever hear in your 18 years at Hirsch of a broker having to file annual reports with the New York Stock Exchange?

A Yes.

Q What reports did you understand had to be filed with the New York Stock Exchange?

A I understood that the surprise audit was filed with the stock exchange.

Q Were you aware of a practice by which the results of the surprise audit would be discussed before filing with the principals of the firm?

A Yes.

Q Did you ever attend such a meeting?

A Yes.

Q With whom was such a meeting held?

A As I remember it was held with possibly Mr. Petrillo and/or the partner in charge of the audit under him.

Q Do you recall at such a meeting the auditor going over answers to a financial questionnaire line by line with the principals of the firm pointing out various

items to them?

A No, not in that sense.

Q In what sense do you recall it?

A I recall that it was a general discussion of the results of the audit.

Q Do you reclal in the course of that discussion the question of the firm's ratio under rule 325 having been discussed?

A No, I don't.

Q Do you recall the subject of possible material inadequacies in the firm's accounting system, internal accounting controls and procedures for safeguarding securities being discussed by the auditors?

A I think I did, yes.

Q You said you were aware of the fact that the results of the annualsurprise audit were filed with the New York Stock Exchange I believe.

A That's my impression, yes, I did say that.

Q In connection with the proposed duPont Hirsch merger did you ever ask anyone to supply you with the results of the most recent duPont surprise audit?

A I did not.

Q Did you, in connection with the proposed duPont Hirsch merger make any inquiry as to what

duPont's ratio was in the spring of 1970? I mean by that ratio for purposes of rule 325 of the New York Stock Exchange.

A I did not.

Q Was that a matter of interest to you in connection with the proposed merger?

A Yes.

Q What else was of interest to you in connection with the proposed merger?

A That the surviving entity after we having sold our company, that the new firm would be a successful and viable firm.

Q Did you ever have occasion, Mr. Mundheim, to advise any clients of Hirsch & Company with respect to possible mergers or acquisitions?

A Not that I recall.

Q As a man who had been on Wall Street for some 20 years I believe, did you have occasion to review financial statements of various sorts?

A I read published statements from time to time of listed firms.

Q And were you able to comprehend them?

A No.

Q You could not comprehend financial statements?

A No, I could not comprehend financial statemenst. No, I could not.

Q Are you familiar with the term aggregate indebtedness?

A I am familiar with the term.

Q Do you know what elements go into aggregate indebtedness?

A I do not. Not specifically, no.

Q Did you ever discuss aggregate indebtedness with Mr. Norman?

A I don't recollect it but it would not be unusual. It could very well be.

Q To the best of your recollection did you ever discuss the matter with Mr. Norman?

A With who?

Q Mr. Norman. To the best of your recollection.

A It's possible. I wouldn't hesitate to say I didnot or I did. I dont know.

Q How about Mr. Gariboldi, did you ever discuss aggregate indebtedness with him?

A I think the same answer. I would believe more likely with Mr. Gariboldi.

Q How about chargest ot net capital, did you

ever discuss such matters with either Mr. Norman or Mr. Gariboldi?

A Well, I think if I discussed anything with them and they told me some figures and they showed me what it was I might have asked questions, what does this mean and what does that mean. More of an explanation.

Q And you understood the explanations given to you?

A Well, I heard it, I can't tell you that I understood it.

Q If you didn't understand it did you ask any more questions?

A I have a certain nature of curiosity and I did ask questions.

Q You satisfied yourself, did you not?

A I satisfied myself at the time. Yes.

Q Is there any doubt in your mind, Mr. Mundheim, that you could interpret a computation of net capital?

A That I could interpret?

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Q Yes.

A Do you mean if somebody tells me it is 1,000 per cent do I understand what that means?

Q Yes.

A I know what the words mean.

Q You know what 2,000 per cent means, do you not?

A I do. I know what it means in the sense that that's the top limit.

Q I think you said that you were not aware of what duPont's ratio was in the spring of 1970?

A That's right.

Q And you did not inquire?

A Not that I recall, no.

Q Mr. Mundheim, in connection with the proposed audit of Hirsch & duPont did you give any consideration to having an audit of duPont made for Hirsch & Co.?

MR. CAMHY: I believe Mr. Hyde misspoke. I wonder whether he would --

A It's a question of audit, proposed audit.

MR. HYDE: May I have it read back?

(Read)

MR. HYDE: I'm sorry, proposed merger. Thank you, Mr. Camhy.

THE WITNESS: And the rest of that was?

MR. HYDE: Would you read the rest please.

(Read)

A No.

Q You did not?

A Not as I recollect.

Q Did you think about that yourself?

A I think it was an impossible situation from a cost standpoint.

Q You mean it would have been too expensive?

A That's correct.

Q I believe in testifying with respect to your decision to go into the merged firm you testified that that decision was based upon an exercise of your own independent judgment, is that correct?

A As to my investment, yes.

Q It is true, is it not, that each individual partner, or limited partner in Hirsch & Co. was free to use his own independent judgment in deciding whether or not to join the merged firm and to invest money in it, was it not?

A Yes, sir.

Q No one went in against his own will.

A I don't think so.

Q Do you know of anyone who did?

A No, I don't.

Q Mr. Mundheim, would you have invested $900,000 in duPont, Glore, Forgan in July of 1970 standing alone?

MR. CAMHY: I object to the form of the question, your Honor.

THE COURT: Mr. Hyde, I really don't see what purpose it is going to serve. I am going to sustain the objection.

Q Was it an essential quid pro quo for your investment in duPont, Glore, Forgan that duPont, Glore, Forgan assume certain liabilities contingent and non-contingent of Hirsch & Co.?

A Was it -- what was the word?

(Read)

A Yes, certainly.

Q You would not have put up the money otherwise, would you?

A The sale wouldn't have been made. It was not a question of putting up money.

Q There would have been no --

A Been no deal.

Q No deal and no, consequently no investment by you with it not for that.

A That's correct, yes.

Q Did you think it was a wise investment that you

made so as to relieve yourself of all contingent liabilities?

A I don't think that the investment was made for the purpose of relieving me of all contingent liabilities It was not made for that purpose.

Q Well, what was the purpose?

THE COURT: Mr. Hyde, please, I think that it seems to me this is cumulative. Mr. Mundheim has testified on cross-examination by Mr. Brooks that one of the essential elements of the agreement was that they assume, the duPont firm, assume all known liabilities, and there may be agreement on that basis. Now I think we have had enough of that. Let's move on.

MR. HYDE: Let me ask just one more question in that connection then if I may, your Honor.

Q Was the objective you had with respect to being relieved of contingent liabilities achieved?

A In contractual form it was.

Q Let me ask you this: To this day has any of these liabilities of Hirsch & Co. contingent or otherwise been asserted against you?

A Yes.

Q What?

A A lease at 25 Broad Street.

Q What is that?

A It is a lease that was assumed by duPont, Glore, Forgan and I really don't know the technical parts of it but they are trying to throw it back onto us.

Q Who is?

A The landlord.

Q Have you resisted that effort?

A Vigorously.

Q Mr. Mundheim, who represented duPont in connection with the merger negotiations?

A Within the duPont firm?

Q Yes.

A I would say it was Wally Latour carried the brunt of it.

Q Who else participated actively?

A Milton Speicher.

I think that Mr. Rousselot attended a number of meetings. Lwellyn Young.

Q Mr. duPont?

A He in one meeting, and then as far as I can recollect in one meeting.

Q That was the meeting with respect to the question of whether additional capital was available?

A Correct. Well, it was a meeting, a general meeting,

yes, in which that was one of the things.

A Yes.

Q In the course of these merger negotiations you had discussions with Mr. Gariboldi, I believe you testified to, with respect to what he had found at duPont?

A Yes.

Q Did Mr. Gariboldi mention figures for duPont's short stock record differences?

A I don't recall the figures now but I heard his testimony yesterday and I think he said he did tell me and I accept that.

Q Do you believe that to be true?

A I have no reason to disbelieve it.

Q Did Mr. Gariboldi also inform you with respect to duPont's fails to deliver?

A My answer would be the same for that as it was for the previous question.

Q That is affirmative.

A I don't recall but if he says I did then I did.

Q Well, let me direct your attention to page 147 of your deposition. You were asked the question in connection with discussion with Mr. Gariboldi:

"Q Tell me what components you discussed and I would like to go through each component and see what was said

about each. You name one and then we will attack it."

A This is your testimony, Mr. Mundheim "Fails to deliver.

"Q What did Mr. Gariboldi have to say about duPont fails to deliver?

"A He mentioned the amount."

Does that refresh your recollection?

A I don't think it is substantially any different than what I have said. I don't deny it.

Q Do you agree wit' it? Did Mr. Gariboldi also inform you with respect to duPont's fails to receive?

A Whatever I said in the deposition I am willing to stand by.

Q On your deposition page 148 you were asked the question:

"What else did he say?

"A Fails to receive."

Does that accord with your recollection? On your direct testimony you referred to a meeting with Mr. Petrillo of Haskins & Sells. Do you recall when that meeting was?

A No, I don't. I think it was before -- I can't tell whether it was between -- I think it was before the first -- the first meeting before it was called off.

Q In connection with that meeting or any other meeting that you had with Mr. Petrillo did Mr. Petrillo make any substantive statement with respect to the condition of Francis I. duPont?

A Mr. Petrillo made no comment whether in fact duPont was in or had been out of ratio which had been corrected. In other words, there was nothing that Mr. Petrillo said that would cause us to be concerned. It was just the reverse.

Q Was there anything that he said concerning the condition of Francis I. duPont that would lead you not to be concerned?

A May I have that again please?

(Read)

A Yes, he thought it was a good idea to make a deal with them, to merge.

Q What did he say in that respect?

A He said he felt we had something to offer.

Q You had something to offer?

A The firm. We had a certain amount of manpower and to be able to help to correct the back office problems.

Q He felt that Hirsch could make a contribution to duPont's back office problems?

A Certainly. That's right.

MR. HYDE: No further questions.

MR. POLLACK: If your Honor please, I would like to call the attention of the court to any document at the bench that has the full caption of this case in order to keep in perspective the few questions that I have of Mr. Mundheim, I would like the court to observe that we appear for the third, fourth and fifth named defendants in the caption. We do not appear for the sixth named defendant. I would also call to the attention of the court the sixth named defendant, duPont Glore Forgan, Incorporated is no longer a party in any respect to these proceedings and is and always was quite separate from the partnerships which are the fourth and fifth named defendants.

MR. CAHY: Your Honor, I don't choose to get into a colloquy with Mr.Pollack about that. There are some connections, they are extremely complex. If they have to become an issue here I am more than prepared to meet the issue. And I don't know what Mr. Pollack is getting at so I don't see any point in extending it but I am just not going to sit silent in the face of that kind of a statement.

THE COURT: All right.

MR. POLLACK: In my questions when I refer to or use the term duPont I will be referring to the two partnerships in liquidation. That is to say, the two defendants named

Francis I. duPont & Co., and F.I. duPont, Glore Forgan & Co.

THE COURT: All right.

CROSS EXAMINATION

BY MR.POLLACK:

Q Mr. Mundheim, in December, 1970, you had a meeting with Mr. Lasker and Mr. Haack, is that correct?

A That's correct.

Q The subject of that meeting was the retention by you of your money in the duPont firm, is that correct?

A The withdrawal of my right to withdraw, yes.

Q As I recall your testimony you had two separate meetings on that day in December of 1970, is that correct?

A That's correct.

Q Who was at the first meeting?

A Mr. Haack and Mr. Lasker only.

Q And you?

A And myself.

Q The meeting was at your office?

A At Mr. Lasker's office in the stock exchange building.

Q Only the three of you were present?

A That's correct.

Q In other words, no one from the duPont firm

was present, is that correct?

A No. That's correct.

Q In the afternoon where did the meeting take place?

A The second meeting?

Q Yes.

A The second meeting was in the early evening.

Q In the early evening where did the meeting take place?

A That took place in the offices of Proskauer Rose Goetz & Mendelson.

Q Who was present?

A Well, Mr. Lasker, Mr. Haack, either Mr. Rohayton or Mr. D'Annunzio, Mr. -- in the office, maybe not just in one meeting, but present, Mr. Meyerson, Mr. Hart, Mr. Hirsch, Mr. Kohns, Mr. Fuld, Mr. Feurst. That's the best of my recollection.

Q Is it correct then to conclude that no partner of duPoint was present at that meeting?

A The only question should be in what role was Mr. Meyerson or Mr. Hart. But other than those two there was no duPont person there.

Q I will represent to you that Mr. Meyerson never was a partner of duPont, nor was Mr. Hart ever a partner of duPont. Other than those two gentlemen was there any

partner from duPont there?

A No.

MR. POLLACK: At this point, your Honor, I would ask for the clarity of the record that Mr. Camhy stipulate that neither Mr. Meyerson nor Mr. Hart was ever a partner of duPont. Should it be necessary we can prove that by putting a witness on I would prefer not to do so.

MR. CAMHY: Your Honor, I am just not in a position to do so out of personal knowledge. There was a coalescing of those two groups during December and I am just not that familiar with the detail of it. I wouldn't really dispute Mr. Pollack on anything he represents as a fact, but on the other hand I am just in no position to do so out of personal knowledge.

MR. POLLACK: I represent to the court that Mr. Meyerson and Mr. Hart were officers of a company called EDS. They were not at any time partners in the duPont firm to which Mr. --

THE COURT: Well, I think whether Mr. Camhy can agree to it or not it appears to me that from the very testimony of Mr. Mundheim who was at that time a partner in the succeeding company, that is the merged company, and he talked of these gentlemen as far as I was concerned as being representing some man from Texas who was seeking to

put capital in. I am not unclear about it. It is clear enough to me.

MR. POLLACK: Fine. Thank you, your Honor. My point of course was merely to develop the evidence in the record to the effect that there was no partner of duPont present at these meetings.

THE COURT: All right.

BY MR. POLLACK:

Q In connection with the acquisition of your interest in the duPont firm in or about July 2, 1970, were you ever denied information by anyone from duPont?

A Denied, no.

Q Were you given access to any information that you sought?

A Any questions asked I would get a verbal answer.

Q Did you ever get any false information from duPont?

A That I don't know.

Q Do you know of any false information that you ever got from duPont?

A I would think incomplete information.

Q Let us for the moment confine ourselves to false information then we will pass on to incomplete information.

A Not that I know of.

Q You testified that you were given incomplete

information by duPont. Can you tell us in what respect you were given incomplete information by duPont?

A Incomplete in the sense when there is no backup material.

Q Did you ever ask for backup material that was then refused?

A Refused is difficult to say, but -- is one word, but difficult to get is more like it.

Q Can you tell us any backup information that you asked for in connecrion with acquiring your interest in duPont?

A Not at this time I can't.

Q That you did not receive.

A No, I can't.

MR. POLLACK: May I merely inquire through the court as to whether the reporter got the full question because Mr. Mundheim and I spoke at counter point at the last question and answer.

(Read)

MR. POLLACK: I think it is clear enough though not artistic. If your Honor please, may I have just a moment?

THE COURT: Yes.

MR. POLLACK: May I ask that Mr. Mundheim be given a copy of Exhibit M, please? Do you have it, Mr. Mundheim?

THE WITNESS: Yes. Is this the application to the New York Stock Exchange?

Q Yes.

A Yes, I do.

Q Now Exhibit M as I understand it is an application by you to the New York Stock Exchange to be permitted to become a partner of duPont, is that correct?

A That's correct. Yes.

Q You filed this and signed it some time in or about July, 1970, is that correct?

A It was signed July 1, 1970.

Q I direct your attention to the fourth page and I would like to ask you some questions about certain statements that you made on the fourth page. Do you have the fourth page in front of you, Mr. Mundheim? That is the page that has the box marked "Important."

A I do.

Q Mr. Mundheim, one preliminary question. Is it correct that this is both an application by you in which you make certain statements and an agreement by you in which you agreed to do certain things; is that correct?

MR. CAMHY: Your Honor, I object. It is really calling for legal conclusions.

Q Well, Mr. Mundheim, you understood that this was an

application in agreement form, did you not?

MR. CAMHY: I renew my objection.

THE COURT: I think it speaks for itself.

MR. POLLACK: Very well, your Honor.

Q Directing your attention to the first sentence in the box it reads, and I quote "This application for approval by the Board of Governors is not being made in reliance upon the standing of the above named organization as a member organization of the New York Stock Exchange or upon the exchange's surveillance of such organization or its capital position."

When you signed this application you made that statement. Is the statement true?

A I signed this statement.

Q Is the statement true?

A It is not the way I read it. The way I interpret it.

Q Regardless of how you read it or interpreted it my question is whether the first sentence in this box was a true and correct statement by you.

A I signed it.

Q I know you signed it but my question is was it a true and correct statement?

A I have to say yes then.

Q The second sentence says, I have made an investigation of such member organization and its partners, officers, directors and stockholders as I deem necessary and appropriate under the circumstances, including an examination of the latest certified audit by Haskins & Sells dated September 28, 1969, and a recent computation of net capital prepared by the member organization dated April 30, 1970. Now when you made that statement was it a true and correct statement?

A Again I signed it and I have to stand by what I signed.

Q I understand that you signed it but the question was, was it a true statement when you made it?

A I have to say yes.

Q The third sentence in that box says "I am not relying upon the exchange to provide any information concerning or relating to such member organization and agree that the exchange has no responsibility to disclose to me any information concerning or relating to such member organization which it may now or at any future time have." Is that statement which you made true and correct?

A Same answer as before.

Q Your answer before was that it is a true and correct statement?

MR. CAMHY: That was not his answer before. His answer before was he signed it and having signed it he has to say yes.

A I have to stand by it.

MR. POLLACK: I respectfully ask that the court instruct Mr. Camhy not to interrupt my cross-examination.

THE COURT: All right, Mr. Pollack.

MR. POLLACK: Is the court satisfied that we have an answer from the witness?

THE COURT: I am satisfied that you have an answer from the witness.

Q The fourth sentence says "I agree for myself, my personal representatives, successors and assigns that neither the exchange, its special trust fund nor any governor, officer, trustee or employee of said exchange or fund shall be liable to me with respect to my investment or interest in such member organization, or with respect to any repayment of any such investment."

Did you in fact make that agreement, Mr. Mundheim?

A As I said before I signed it so I have to stand by it.

Q In saying that you signed it and that you have to stand by it do you acknowledge that you made that agreement with the exchange?

A I signed it, yes, I do.

MR. POLLACK: No further questions.

THE COURT: When you finish your redirect examination with Mr. Mundheim do you have anything further?

MR. CAMHY: Yes, I will have Mr. Hirsch, I will want Mr. Speicher and I will want Mr. Lill.

MR. POLLACK: This is the first we have heard Mr. Camhy will want Mr. Speicher who has testified at length and I see no reason for him to be recalled.

MR. CAMHY: Mr.Pollack, I wouldn't have wanted him if you hadn't put in the cross-examination that you just did. I now have to rebut it.

THE COURT: All right, we will adjourn until 2 o'clock.

(Luncheon recess)

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AFTERNOON SESSION

2 P.M.

MR. CAMHY: Your Honor, before the matter proceeds any further I would like to put on the record an apology to Mr. Pollack for some remarks that I made to him after we broke this morning which were made in the heat of temper. What is worse about them is that they were inaccurate.

THE COURT: Well, I would suggest you make that apology to Mr. Pollack personally since I don't know anything about it and I would just as soon not.

MR. CAMHY: All right, thank you.

THE COURT: I think he will accept a personal apology without --

MR. CAMHY: I have already done that, your Honor. I just want to make sure that the group heard it.

THE COURT: All right.

MR. CAMHY: Mr. Speicher, please.

THE COURT: Wait a minute. Are you through--

MR. CAMHY: Yes, I have nothing further of Mr. Mundheim.

THE COURT: Well, wait, Mr. Mundheim. I want to ask -- I hesitate to ask this question because I am fearful that it may engender some more examination but I am afraid that my curosity is going to outweigh my caution.

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The question seems to be relatively simple. As I understood your testimony you went to a meeting and you were on the financial committee of the merged firm which I assume if anybody would have personal knowledge of the financial condition. You would go to a meeting with some outsiders, as far as I know the stock exchange members, it's been testified that I think Mr. Meyerson whoever it was, were certainly not members of the firm, and you were advised at that point that there was no money and you tell me that you acted upon that. I don't understand it. Do you understand my question?

M A R S H A L L M U N D H E I M, resumed.

THE WITNESS: I think I do, your Honor.

THE COURT: I would like some explanation of that. I don't understand it.

THE WITNESS: Well, the two, your Honor, the two senior men of the New York Stock Exchange being there, and hearing whatever statement was made and supporting it--

THE COURT: You mean -- did you assume that they knew more about the financial status of your firm than you did?

THE WITNESS: Yes, sir.

THE COURT: All right, I suppose that's sufficient.

MR. BROOKS: I had two questions, your Honor,

before you asked so I don't want you to feel responsible for them and I ask permission to ask them.

THE COURT: All right.

BY MR. BROOKS:

Q Mr. Mundheim, there were some Hirsch partners that left the duPont Glore Forgan firm at the end of December, 1970, were there not?

A There were.

Q When you had these meetings with Messrs. Haack and Lasker and the one or two other gentlemen that you identified from the New York Stock Exchange in December of 1970 did you tell them that you believed that they were in any way responsible for your predicament?

A My predicament as of that moment?

Q Yes, sir. Being an investor in this firm that seemed to be in trouble.

A No, I did not.

MR. BROOKS: Thank you.

THE COURT: All right. Do you have anything further?

MR. CAMEY: I think -- no, nothing further of this witness, your Honor.

THE COURT: All right, thank you.

(Witness excused)

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MR. CAMHY: Mr. Speicher, please.

M I L T O N A. S P E I C H E R, recalled.

THE COURT: I gather that Mr. Speicher is being called for a very limited purpose.

MR. CAMHY: Yes, very limited.

MR. POLLACK: Your Honor, since we object to the recall of Mr. Speicher may I inquire through the court of the subject area that Mr. Camhy intends to question Mr. Speicher on?

THE COURT: All right. I didn't inquire of that because I thought that Mr. Camhy had probably told you in view of what occurred. What purpose is he being called for?

MR. CAMHY: Mr. Speicher was a partner of duPont who had as good a familiarity with its financial affairs and capital position in December of 1970 as could be had. Any familiarity was difficult because of the circumstances. But he did have as good a familiarity as could be had. And that he expressed an opinion in court papers at one point that in his opinion this money could not be withdrawn in view of the capital position of the company at that time.

MR. POLLACK: There is a question of relevance of any such opinion in these proceedings.

MR. BROOKS: Your Honor, I don't think Mr. Speicher

is qualified to give an opinion. He is not an expert. He can tell us what the facts were but I don't think he can tell us his opinion.

MR. CAMHY: He can state his belief which he did.

MR. BROOKS: I think that's a different word for an opinion.

MR. CAMHY: I agree, your Honor.

THE COURT: All right.

BY MR. CAMHY:

Q Mr. Speicher, were you active in duPont's affairs in December of 1970?

A I was a limited partner and employee at that time.

Q Yes, but did you have available to you the financial information which was available at that time, the audit?

A Yes.

Q And you had been just prior to that a financial partner at the firm, hadn't you?

A Yes.

At the time you are talking about is before the 15th of December, is it not?

Q That's correct, in connection with the Perot reorganization.

A Yes.

Q Now was 't the firm then under strong capital

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pressure from the exchange?

A It was.

Q And didn't that capital pressure from the exchange cause you to believe at that time that it would be highly unlikely, if not impossible, for a partner such as Mr. Mundheim, Mr. Kohns and Mr. Hirsch to withdraw their capital at that time?

MR. BROOKS: I object to the question, your Honor. Mr. Speicher's belief is not competent, admissible evidence and is irrelevant.

THE COURT: I think that's right.

MR. CAMHY: Well, Mr. Speicher had knowledge of the facts of the company's capital situation.

THE COURT: Then why don't you ask him that? Why don't you ask him that? Did he express his belief to these gentlemen? Did he tell them they couldn't withdraw their money?

MR. CAMHY: I don't know that he did, your Honor. He did at a later date, yes.

THE COURT: Well, why don't you ask him the facts, if he knows the facts could their money have been withdrawn if he knows?

Q That's the question, could their money have been withdrawn at that time?

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A We are speaking about Mundheim now, are we?

Q Mundheim, Hirsch and Kohns.

A This would be before the agreement made on the 14th of December --

Q Yes, in connection with Perot putting the money in.

A -- which had not had the Perot money put in yet.

Q That's right.

A And that ten million was needed which they were going to contribute in order to keep us in compliance.

Q Right.

A Without the ten million we would not have been able to withstand a withdrawl and the exchange might well have been of the mind to say you can't take it out. That's what I was trying to say on that --

MR. BROOKS: Your Honor, I move to strike the portion of the testimony which said the exchange might well be of the mind to not permit them to take it out as incompetent from this witness.

THE COURT: No, that motion is denied.

MR. CAMHY: Your Honor, may I now read Mr. Speicher's statement from an earlier affidavit which is confirmatory but slightly different?

MR. POLLACK: I object to the reading if it is

confirmatory. Furthermore these are statements made in another litigation.

THE COURT: The objection is sustained.

MR. CAMHY: No further questions.

THE COURT: All right, Mr. Brooks, do you have any questions?

MR. BROOKS: Yes.

BY MR. BROOKS:

Q Mr. Speicher, isn't it a fact that a number of Hirsch partners were permitted to withdraw their money in the same transaction by which Messrs. Kohns, Hirsch and Mundheim elected to keep their money in?

A Yes, but that was 16 days later. That's true.

MR. BROOKS: Thank you, sir.

THE COURT: Mr. Hyde?

MR. HYDE: I have no questions, your Honor.

THE COURT: Thank you very much, Mr. Speicher.

(Witness excused)

THE COURT: All right, call your next witness.

MR. CAMHY: Mr. Hirsch please.

THE COURT: I am of the opinion that except for matters which relate to Mr. Hirsch very personally that the matters that have been exposed here with regard to the investigation and things of that kind, that I don't think

we are going to need any further testimony on.

MR. CAMHY: I understand, your Honor.

THE COURT: I think we do need to know and have in the record something about Mr. Hirsch and his knowledge and skills.

H O W A R D C. H I R S C H, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CAMHY:

Q Mr. Hirsch, how old are you now?

A I am 79 -- I am 78 and a half. Over 78 and a half.

THE COURT: Can you hear that?

MR. BROOKS: Not too well, your Honor.

MR. HYDE: I think if Mr. Camhy stood over here, the witness is directing his remarks to Mr. Camhy.

THE COURT: Maybe if you stood back it would be helpful, it would force Mr. Hirsch to put some strain on his vocal cords.

THE WITNESS: Yes, sir, I will speak louder, your Honor.

THE COURT: All right.

Q Mr.Hirsch, how old are you?

A I was 78 on the 10th of September of this year.

Q Would you tell the court --

A Of last year.

Q Would you tell the court your education and then your professional experience?

A Well, I went to a number of private schools. I went to Columbia University for a year. Had a great deal of tutoring, and joined the Navy and subsequent to that took a number of extension courses.

Q What was your first job?

A My first job was at Henry R. Worthington's in 1914 or '15 as a student engineer, as an aspirant I should say in preparation.

Q Did your family found Hirsch & Company?

A Yes.

Q Was that your father and grandfather?

A No.

Q Was it your uncles?

A It was my father and two other partners.

Q After the student job that you had what was your next job?

A My next job was on coming out of the Navy in 1920 I worked in various positions in the office of Hirsch Lillienthal & Company.

Q How old a firm was Hirsch Lillienthal? When was

it founded?

A In 1911. Although my father was a member of the stock exchange before that.

Q Did you remain in Hirsch Lillienthal or successor companies after you went to it -- what year did you say?

A Yes, until its dissolution.

Q I have forgotten the year that you said that you went in.

A March, 1920.

Q What were your duties at Hirsch Lillienthal over those years?

A Well, in the first two years going through practically every department in the firm. Subsequently, in 1922, I became a member of the New York Stock Exchange. I also became a member of the American Stock Exchange, I don't remember when, but successively either as a member or on various committees of other exchanges or in their formation.

Q When did you become the head of the firm?

A Upon the death of my father in 1938.

Q At what point did you have Mr. Kohns as your assistant?

A That's rather difficult to state. Progressively

I should say in the last five or ten years before dissolution he occupied more and more important positions, or dominant positions.

Q In 1968 and 1969 approximately how many branches did the firm have?

A I can't remember. I think it was 16.

Q Approximately how many people were on its payroll including registered representatives?

A I think something like 600.

Q Did the various departments have administrative personnel over them?

A Yes.

Q Did you involve yourself in the internal and day to day affairs of the various departments?

A For many years, yes.

Q I am talking about 1967, '68, and '69.

A I involved myself almost more in the foreign, in their foreign business than in any other. I was a member of numerous organizations, committees.

Q By that time you were certainly, were you not, familiar with the meaning of phrases like fails, fails to receive, fails to deliver?

A Yes.

Q And the requirement of segregation of securities?

A Yes.

Q And securities count differences?

A Yes.

Q Long differences and short differences?

A Yes.

Q And you knew about things like capital computation? Rule 325 capital computation?

A I relied on others to carry them out.

Q Yes, but you knew the inherent principles of them, didn't you?

A I knew they were required, yes, but I never attempted to do it myself.

Q And you knew about 1,000 ratio and 1,500 ratio and 2,000 ratio and the implications of those numbers, did you not?

A Certainly.

Q And you knew that differences could have an impact on ratio depending on how they were computed, isn't that right?

A Yes.

Q Now I ask you, Mr. Hirsch, whether you were ever shown or knew of a capital computation for duPoint made by Haskins & Sells as at a previous audit date which showed a ratio in excess of 3,000 for duPont.

A No, not before the merger or sale.

Q I ask you whether you knew before the merger about a 6.8 million dollar capital deficiency in duPont for 325 purposes as at the audit date.

A No.

Q I ask you whether you knew about an additional deficiency asserted by the New York Stock Exchange personnel of approximately $8.1 million over and above the $6.8 million before the merger.

A No.

Q The answer is no?

A No.

Q And I further ask you whether you had ever heard that the ratio of duPont had been computed by stock exchange personnel as at the audit date in the 70, 76,000 range.

A No.

Q Would all of those facts have had an impact on you?

A Yes.

Q Were you made aware during the period immediately prior to the merger by Mr. Gariboldi or Mr. Norman about a negative feeling on their part about the merger because of securities differences?

A I wouldn't say a negative feeling, if I may answer that way. Yes, I was aware of a negative feeling.

Q And did you nevertheless elect to proceed with the transaction anyway?

A Yes.

MR. CAMHY: In the light of your Honor's observation I think I have nothing more of this witness -- excuse me, your Honor. Your Honor, I am going to offer those withdrawal agreements.

Q Mr. Hirsch, I show you Plaintiffs' Exhibit 6, which is a letter dated December 3, 1970, and ask you whether that is your signature on it (handing).

A It is.

MR. CAMHY: I offer it in evidence.

MR.HYDE: No objection.

MS. LICHSTEIN: No objection.

THE COURT: Plaintiffs' Exhibit 6 is received in evidence.

Q Mr. Hirsch, I show you Plaintiffs' Exhibit 8 which is an agreement subordinating an account and ask you whether that is your signature on it (handing).

A It is, yes.

MR. CAMHY: I offer Exhibit 8.

MR.LICHSTEIN: No objection.

MR. HYDE: No objection.

(Plaintiffs' Exhibit 6 was received in evidence)

(Plaintiffs' Exhibit 8 was received in

evidence)

Q Now, Mr. Hirsch, I show you Exhibit 13 which does not have your name on it but attached to which is a copy of your subordinated loan account and I ask you whether you received this letter with the attached copy of the account, and it's a dear sir form letter (handing).

I represent to you that it was taken from your files.

A I don't recall it, but it evidently was received by me.

MR. CAMHY: I offer it in evidence.

MS. LICHTSTEIN: I am sorry, your Honor,we couldn't hear what Mr. Hirsch had to say about the document. Could we read it back, please?

MR. CAMHY: He said he couldn't recall it, but it evidently was received by him. And I represent that it was found in his files and it has his name on the forms.

MR. HYDE: May I see that? Is this the same as the other letter?

MR. CAMHY: No, it's sliqhly different. It's a --

THE WITNESS: Subordinated loan.

MR. HYDE: Your Honor, this is not

addressed to Mr. Hirsch and --

THE COURT: Well, that was all brought out. It was not addressed to Mr. Hirsch but they found it in his files and he has knowledged that it was in his files and he probably saw it.

MR. HYDE: Well, I don't think a proper foundation has been laid, your Honor.

THE COURT: Is this the letter?

MR. CAMHY: Yes, it is a disclaimer letter --

THE WITNESS: May I read the text?

MR. CAMHY: Yes, maybe reading the letter will help (handing).

THE COURT: I am going to overrule that.

THE WITNESS: Yes, I well remember this.

MR. CAMHY: You do remember it.

MR. BROOKS: No objection.

MR. LICHSTEIN: No objection.

(Plaintiffs' Exhibit 13 was received in evidence)

MR. CAMHY: That's all I have of this witness, your Honor.

CROSS-EXAMINATION

BY MS. LICHTSTEIN:

Q Mr. Hirsch, I believe that you testified that for a period of time you were a member of the New York Stock Exchange, is that correct?

A I was a member of the New York Stock Exchange.

Q Do you remember in what years you were a member of the exchange?

A Yes. I believe it was March -- I believe it was from March 1922 to July 1927.

Q And am I correct in understanding from you saying that you were a member of the exchange that you personally owned a seat on the exchange?

A I personally owned the seat on the exchange.

Q And would I be correct in saying that you were down on the floor of the exchange doing trading during that period oftime?

A I was down on the floor most of that time.

Q During the period of time when you were a member of the exchange were you a member of any particular committees on the exchange?

A No.

Q I believe that you also testified that you

participated in the formation of other exchanges, perhaps other securities exchanges or commodities exchanges?

A Commodity exchanges.

Q What would be the name of that exchange?

A Well, one of them was the tobacco exchange, which no longer exists and the other was the commodity exchange.

Q And in what period of time are we talking about, Mr. Hirsch?

A I can't remember frankly.

Q Were you ever a governor or a member of the board of directors of these exchanges?

A No, I was on a couple of committees but I don't remember which.

Q Mr. Hirsch, am I correct in understanding that during the period of time prior to when you began to retire from Hirsch & Company that you played a very active rule in the management of Hirsch?

A Yes. For a sufficiently long period.

Q Are we talking about a period of perhaps 45 years?

A Let me see. Will you state that again? Because before I became the senior partner I was also active in the firm.

Q So we can say at least from 1920 to perhaps 1966 you devoted substantially all your business energies to Hirsch & Company?

A Substantially all ofmy time, yes.

Q And you would go into your office about every day or else concern yourself with other business of Hirsch & Company, is that correct?

A Yes.

Q During that period of time did you ever have senior interest in Hirsch & Company interms of your percentage of share in the profits and losses of Hirsch?

A I did.

Q What was the greatest percentage share that you ever had?

A Somewhere between 23 and 25 per cent, I should say.

Q During what period of time did you have that percentage interest in Hirsch & Company?

A I am afraid I'd have to look that up.

Q Was it for a long period of time, 10, 20 years?

A No, it increased and decreased.

Q So it would be fluctuating annually?

A Pardon me?

Q It would be fluctuating year by year, your interest in Hirsch & Company?

A Well, it would vary because it would depend on retirements and admissions.

Q Talking about retirements, Mr. Hirsch, did you have any pension plan with Hirsch & Company?

A I beg your pardon?

Q Did you have any pension arrangement with Hirsch & Company?

A No.

Q Other than your interest in the profits and losses of Hirsch & Company did you receive any salary?

A No.

Q Prior to the time when Mr. Kohns joined youas your assistant in Hirsch & Company --

A I received interest on my capital.

Q I understand.

A That goes without saying.

Q Prior to the time when Mr. Kohns joined you at Hirsch & Company were you in charge of calculating things like net capital ratios for the exchange?

A No.

Q But you were familiar with rule 325 of the exchange as it changed from year to year during the period when you were a senior partner at Hirsch & Company?

A Well, I couldn't be familiar with all, if I may answer.

Q But you were generally familiar with rule 325 of the exchange, is that correct?

A I think I was prudently familiar if I may use the term.

Q You certainly may.

Mr. Hirsch, I believe that you testified in the period about 1966 or 1967 you began to retire from you active activities at Hirsch & Company, is that correct?

A Frankly I don't know.

Q There did come a period of time in which you were less active in Hirsch than you previously had been, sisn't there?

A I tried to make it gradual.

Q Let's say around 1969 or so what duties did you have remaining at Hirsch & Company?

A I attended and chaired most of the meetings when I was present in the country.

Q Did you have any duties with regard to

Hirsch & Company's European offices?

A I visited them regularly.

Q And you talked to the managers there and discussed business with them?

A I talked with the managers, talked to the banks and larger clients.

Q Do you remember, Mr. Hirsch, what your percentage share in the profits and losses of Hirsch & Company was in about 1970?

A Approximately 8 per cent.

Q Mr. Hirsch, I would assume that in your role as a senior partner at Hirsch & Company you received the profit and loss statements of Hirsch & Company, is that correct?

A I probably did.

Q Do you have any recollection of having so done?

A Well, they came to my desk. Whether I always read them is another question.

Q But they were there available to you if you wanted to see them?

A They were always available I think.

Q Mr. Hirsch, we have had extensive testimony at this trial --

A I beg your pardon?

Q We have had a lot of testimony in this trial that 1969 and 1970 were the first years inthe history of Hirsch & Company in which Hirsch suffered operating losses. Does that accord with your recollection?

A That accords with my recollection -- well, one might have adefinition of operating losses if I may say that. But I believe that to be true in the way I understand you to mean.

Q So would it be fair to say for a company of the age of Hirsch & Company that this was historically a significant event, these losses, wasn't it?

A It was.

Q Mr. Hirsch, would it be accurate forme to say that since Hirsch was suffering operating losses in 1969 and the fist six months of 1970 you personally were suffering losses from your profit and loss shares in Hirsch & Company, weren't you?

A Proportionately.

Q Do you have any recollection as to what your share of the operating losses of Hirsch & Company was in 1969?

A Approximately 8 per cent.

Q Can you relate that to dollar terms for us,

please?

A I'd have to refresh my memory.

Q Let me try and refresh your memory. I have in my hands Haskins & Sells Exhibit O, which is the partnership tax return for Hirsch & Company for the calendar year 1969 and I believe here it shows an ordinary income attributable to your interst of $239,366.38. Does that refresh your recollection at all (handing)?

A I see it.

Q You have no reason to believe that that's inaccurate, do you?

A It's a matter of interpretation.

Q But you --

A My net change in my equity is not represented there.

Q I understand that. But you have no quarrel with my statement --

A Certainly not.

Q -- that the ordinary income loss attributable to you is shown on this document.

A That's right.

Q Mr. Hirsch, in the year or so prior to your transaction with F. I. duPont, had Hirsch been having any

problems or difficulties in complying with the New York Stock Exchange's net capital rule?

A I think that, if I may say, I think that has all been brought out. If you would agree that I didn't even know myself.

Q You personally were aware of those difficulties AT Hirsch with complying with the exchange's rules, weren't you?

A Not in all respects.

Q But in certain respects?

A In some respects.

Q Mr. Hirsch, we had some testimony here yesterday from Mr. Kohns talking about the establishment of a negotiating committee at Hirsch & Co. that would negotiate any potential merger transaction with F. I. duPont. Mr. Kohns said that he believed that there was a meeting of the partnership of Hirsch in which it was decided thatMr. Kohns, Mr. Mundheim and Mr. Framen would constitute the membership of the negotiating committee. Does that fit with your recollection of the events?

A Yes.

Q And were you present at the partnership meeting at which it was decided that these three gentlemen

would constitute the negotiating committee?

A As I recall it.

Q Do you recall signing any documents having to do with the establishment of the negotiating committee?

A I do not.

Q Mr. Hirsch, what were your personal objectives from the potential merger of Hirsch and another brokerage firm?

A I thought there were better opportunities.

Q You thought that there would be better opportunities for whom?

A For us. For the firm.

Q How about for Howard Hirsch, did you think that there might be anything in it for him?

A Very frankly, I steered very clear of it.

Q Mr. HIrsch, I believe that you testified on page 49 of your deposition that you thought with a potential merger there might be some retirement arrangements that would be satisfactory to you that would be broughtabout.

Does that refresh your recollection at all as to the possibility of why you personally might have been interested in the merger?

A It doesn't refresh my memory. I think that, if I may say, is obvious.

Q Let me just read from your deposition on page 39.

MR. CAMHY: Objection, your Honor. He has conceded the point that she made. There is no reason to read the testimony.

THE COURT: There really isn't.

MS. LICHSTEIN: Okay. I am having difficulty hearing Mr. Hirsch and I haven't been really sure that he agreed with what I said.

ATHE COURT: All right. Mr. Hirsch said that the point you made is obvious.

MS. LICHSTEIN: Oh, okay.

Q Mr. Hirsch, after the negotiating committee was set up, was it your understanding that the negotiations and investigation of F. I. duPont that was going to be done was going to be done by this negotiating committee and any employees or other persons whom they might designate?

A I am sorry, that's a very long sentence. Would you mind restating it?

Q Not at all.

Was it your understanding after the negotiating committee had been established thatthe negotiating committee and anyone else whom it might designate were going to be the people who would do the investigation of F. I. duPont?

A At least them, yes.

Q Who else?

A I don't know.

Q How about your attorneys? Did you have any understanding that they were going to play any role in investigating F. I. duPont on your behalf?

A I think they had a natural and proper role.

Q What attorneys are we talking about?

A There were two attorneys.

Q Who were those attorneys?

A And whose function are not entirely clear to me. I don't believe a separation of function.

Q Could you tell us the names of those attorneys?

A Guggenheim & Untermeyer and Proskauer Rose, one partner at Proskauer Rose.

Q What was the name of that partner?

A Mr. Fuld.

Q During the period of time in which the negotiating committee of Hirsch & Company was conducting negotiations of F. I. duPont were you kept aware by the members of the negotiating committee of the information that they were coming up with and of the status of the negotiations?

A I believe so.

Q So would it be accurate for me to say that during the period of time in which the negotiations were taking place you were having conversations or meetings with your copartners in which facts relating to the proposed merger were being discussed?

A On occasion.

Q On occasion. During this period of time, the first six months or so of 1970, were you in the United States?

A Was that the period considered to be the period

of the merger?

Q As far as I understand it.

A I believe I was.

Q And were you at times going into your office at 25 Broadway at Hirsch & Company?

A 25 Broad Street, correct.

Q Excuse me.

A Yes.

Q And when you were there if you walked into Mr. Mundheim and Mr. Kohns in the hall you would have discussions with them about the proposed merger, is that correct?

A On occasion.

Q To the best of your knowledge, Mr. Hirsch, which partners of Hirsch & Company actively participated in investigating F. I. duPont?

THE COURT: Miss Lichstein, why do we need that? Isn't that clear?

MS. LICHSTEIN: I just want to establish Mr. Hirsch's knowledge of everything that went on, your Honor.

THE COURT: Well, I think Mr. Hirsch has indicated his knowledge, that he talked to them at times and he was aware of it.

MS. LICHSTEIN: Okay.

THE COURT: Let me suggest that you have made your point.

MS. LICHSTEIN: Just one more peripheral point.

THE COURT: All right.

Q Your copartners and employees who had been designated to do this investigation of F. I. --

A I beg your pardon?

Q Your copartners who were doing the investigation of F. I. duPont and the employees of Hirsch & Company such as Mr. Gariboldi, you had no reason to believe thatthey weren't absolutely competent to perform the job of investigating, did you?

A I have no -- I have considered them competent.

Q These are people that you had worked with and relied on for a number of years, hadn't you?

A The ones you mentioned, yes. The names you mentioned.

Q At the time of the merger of Hirsch and duPont and Glore Forgan in July of 1970, did you, Mr. Hirsch, know that sometime in the prior year F. I. duPont had not been in compliance with the exahcnge's net capital rule?

A I did not.

Q Do you remember giving a deposition, pre-trial deposition in this case,Mr. Hirsch? Do you remember that event, giving a pretrial deposition?

A I remember a pretrial -- I don't know what you are --

Q I am just asking you if you recall the event of having some testimony taken by Mr. Pollack and Mr. Brooks and Mr. Hyde outside of court --

A In making a disposition, yes.

Q Iwould like to read, in an attempt to refresh your recollection, some questions that Mr. Hyde asked of you and answers that you gave on page 183, your Honor.

"Q I believe you did testify, Mr. Hirsch, that you were aware that there had been net capital deficiencies.

"A That had been corrected.

"Q By duPont?

"A Yes.

"Q Prior toyour entering into the merger?

"A Yes."

Does that refresh your recollection?

A It does refresh it but in the terms of your question if I may say it, it didn't apply.

Q I am sorry that my question was clumsy, Mr.

Hirsch.

A You gave a time frame that I didn't recollect.

Q Well, let's be perfectly clear here. We are talking about your knowledge prior to July 2, 1970, isn't that correct?

A If you say so.

Q Did you know the amount of the capital deficiency of F. I. duPont during the period of time that you said that you knew that they had not been in capital compliance?

A No, I don't recall.

Q Do you know if the figure was a substantial figure

It's a substantial figure and the definition is not clear to me if I may say.

MR. CAMHY: I am sorry, your Honor, I did not hear the --

THE WITNESS: I did not consider it an exhorbitant figure.

THE COURT: He said that substantial is not clear to him, he did not consider it an exhorbitant figure.

Q Mr. Hirsch, I have a question. How are you able to make the determination now that the figure

was substantial or insubstantial if you have no recollection of the amount of the purported deficiency?

A That was only a matter of my judgment. And the figures published that were readily available.

Q From whom were these figures readily available?

A I believe I had a number of sources.

Q Can you name them, please?

A We were a member of a group known as the Wright group which gave some very pertinent figures. The order published figures as required, statutorially required to be published by firms which appeared in the newspapers.

Q Canyou tell me what kind of information the Wright report would furnish you about F. I. duPont & Co.?

A I can't tell you now.

Q But it is your recollection that there was some information in that report about F. I. duPont's prior capital violation?

A No, that wouldn't appear, but the size of the business one could judge.

Q Sir, are you saying that --

A The capital requirement --

Q -- that if someone gave you a figure of say $6 million you, Howard Hirsch, would make your own judgment as to whether that was a substantial figure in comparison to the size of a proposed merger firm?

A It would be an impression.

Q Your impression?

A My impression.

Q As of the time of the merger, July 2, 1970, did you know that F. I. duPont was having problems with fails?

A I did.

Q Who told you so, Mr. Hirsch?

A I may ask whether the problem was highly significant or not.

Q Well, let's see if you can answer my question first. Who do you remember having told you that F. I. duPont was having problems with fails to deliver and fails to receive prior to July 2, 1970?

A I knew that, yes.

Q You knew that.

A Yes.

Q I am asking you how you knew.

A I beg your pardon?

Q I am asking you how you knew that.

A I believe we were informed.

Q Do you remember having received reports that the back office at Hirsch was aware of the fail situation at F. I. duPont?

A Pardon me?

Q Do you remember having anyone at Hirsch report to you that your back office at Hirsch was aware of the problem with regard to fails at F. I. duPont?

A If I understand the question, I do. But I don't believe, if I may say it, that they had any idea of their enormity.

Q Did you have any idea, Mr. Hirsch, as to the size of the fails to deliver and fails to receive at F. I. duPont?

A I think I have subsequent knowledge.

Q But did you have any knowledge on or before July 2, 1970, as to the size?

A No.

Q But you could have asked, couldn't you?

A I could have.

Q But you didn't.

A I found no -- I know of no reason why I personally should have.

Q You trusted that if this factor were significant to the people who were actively involved in the investigation of F. I. duPont that they would have asked, right?

A Yes.

Q Is that correct? On or before July 3, 1970, Mr. Hirsch, were you aware of securities count differences at F. I. duPont?

A Not to the degree that transpired.

Q I think that I could get a yes or a no. Were you aware there were problems with securities count differences at F. I. duPont?

THE COURT: He said no to the degree that transpired, which means that he was aware of them, Miss Lichstein.

MS. LICHSTEIN: Okay.

Q From whom did you find thisinformation out, Mr. Hirsch?

A From many sources subsequent to the merger.

Q I am interested in information that you had prior to the merger, Mr. Hirsch.

A You mean prior tothe merger. Well, would you repeat it? I mean, I may have missed the exact meaning.

Q You were aware that there were problems with securities count differences?

A Yes.

Q At F. I. duPont prior to July 2, 1970, weren't you?

A As stated.

Q And I am asking you if you, prior to July 2, 1970, knew the size of these securities count differences.

A No.

Q Did you know whether the figures were substantial figures or not?

A No.

Q Mr. HIrsch, on your deposition testimony I would like to read you some questions and answers from page 22. I am going to read a few prior questions just to put it in context:

"Q Were you aware of count differences prior to the time that you acquired your limited partnership interest in duPont?

"A I recall it, yes.

"Q Can you recall the discussion you had with Mr. Mundheim on the subject of account differences?

"A Not specifically, yes.

"Q Can you recall the sense of the discussion?

"A Yes.

"Q Please describe it.

"A That they were substantial."

Does that refresh your recollection, Mr. Hirsch?

A I believe I, I hope I gave that impression.

MR. CAMHY: He corrected this. Does your copy indicate a correction?

MS. LICHSTEIN: Not really, no. If your copy has a correction by Mr. Hirsch, why don't you put it in ?

MR. CAMHY: That they were substantial in an absolute sense as compared with Hirsch & Company, but not inordinate for a firm the size of duPont.

Q Do you recall having written that into your deposition testimony, Mr. Hirsch?

A Yes.

Q The sentence Mr. Camhy just read?

A If I may say more than just yes or no, I meant to imply that, that they were not of serious dimension as far as I knew.

Q But in order for you to make the determination as to whether they were of a serious nature or not you had to know the size, didn't you, Mr. Hirsch?

A Probably you are correct, in an absolute sense.

Q Mr. Hirsch, during the first period of merger negotiations with F. I. duPont did you form an opinion as to the advisability of the proposed merger?

A Not beyond what I have already stated.

Q Would it be correct for me to say that you were somewhat opposed to the merger at that time?

A I thought there were better opportunities.

Q Were any of these better opportunities available?

A I believe so.

Q Can you tell me what the best opportunities that were available were, please?

A A return to some people whom we had already been in negotiation with.

Q Who, for instance?

THE COURT: I don't really think we need to go into this.

MR. LICHSTEIN: Okay, your Honor.

Q Just one more question --

A We also had offers of substantial capital at exhorbitant terms.

Q Did you discuss your thoughts that there

were other opportunities which would be better for Hirsch & Company than the proposed merger with F. I. duPont, with Mr. Kohns and with Mr. Mundheim?

MR. CAMHY: May we have the question read again, please, your Honor?

THE COURT: Yes.

A I thought it possible.

Q But did you ever convey your thoughts to either Mr. Kohns or to Mr. Mundheim?

A I don't believe I did.

Q You kept them all to yourself?

A I didn't consider it to be my function upon my retirement.

Q Did you change your attitude with regard to the advisability of the merger with regard to the second series of merger talks?

A I acquiesced. It was always acquiescence.

Q After July 2, 1970, Mr. Hirsch, you became a limited partner at duPont Glore Forgan, didn't you?

A Yes.

Q And you were to receive an office from duPont Glore Forgan, is that correct?

A Yes.

Q And am I correct in stating that you were to

receive $25,000 per year commencing as of July 2, 1970, is that correct?

A Yes.

Q Were you to receive any other remuneration from duPont Glore Forgan?

A An office and s senior partner's office in the main office of the organization and a secretary, secretarial service.

Q Mr. Hirsch, I believe that you were in the courtroom yesterday --

A I beg your pardon?

Q You were in the courtroom yesterday, weren't you for a good part of the day and you heard Mr. Kohns' testimony?

A Yes -- no, not -- no, I wasn't here yesterday -- oh, yes, I was.

Q Okay. I believe that there was a document introduced into evidence yesterday which showed that Messrs Kohns, Mundheim and Hirsch were to jointly receive rights to 2.5 per cent of the profits and losses of duPont Glore Forgan. Does that refresh your recollection? Do you remember that?

A It was one --

THE COURT: Miss Lichstein, that's in the

agreement.

MS. LICHSTEIN: I just want to be sure that Mr. HIrsch was aware of what he was getting from duPont Glore Forgan, your Honor.

THE COURT: Well, the agreement is in evidence and he is a signatory.

MS. LICHSTEIN: Okay.

Q Prior to July 2, 1970, Mr. Hirsch, did you have any conversations or communications with anyone at the New York Stock Exchange regarding the proposed transaction between Hirsch and duPont Glore Forgan? And I am going to exclude Mr. Fraiman from that question.

A No.

Q You had no such conversations.

Mr. Hirsch, I am going to show you a document which we have premarked as New York Stock Exchange Exhibit Q and ask you if you can identify the signature on the last pageas being your own (handing).

A It's my signature, yes.

Q Do you recall signing it on or about the date which it bears?

A I beg your pardon?

Q Do you recall signing it on or about the date

which it bears which is July 1, 1970?

A I believe so.

Q Do you recall where you signed it?

A I do not.

Q Did you sign it in the presence of the notary public whose name appears on this last page of the document?

A That was my secretary.

Q Did you sign this document in her presence?

A I must have.

Q Mr. Hirsch, did you supply the information personally that is filled in the blanks of this document?

A I believe it was largely collected from either my records or the stock exchange records by my secretary, by Miss Lillian Morin.

Q I want to show you the original of a document which was introduced into evidence yesterday as New York Stock Exchange Exhibit JJ. It has a cover letter from Mr. Kohns on it. Do you recall having received this cover letter from Mr. Kohns, and a blank application form attached (handing).

A I don't recall receiving it.

Q You don't recall receiving it?

A No. But it looks as though -- evidently it's

a skeleton --

Q Is any of the handwriting on be document entitled New York Stock Exchange, which is attached to Exhibit JJ your handwriting, Mr. Hirsch?

A A good deal of it, yes.

Q Can you identify any handwriting on the document that's not yours?

A This here (indicating).

Q You are saying that the answer to No. 2A is not in your handwriting?

A Yes. This is not.

Q And you are saying that 2B is not in your handwriting?

A Well, this isn't my handwriting. Partially my handwriting. Than there is some shorthand there, whatever that means.

Q You don't write shorthand, Mr. Hirsch?

A No.

Q So I think that what you are saying to me is some of the handwriting on this document is yours and some of it isn't. Would that be fair to say?

A It would be fair to say.

Q Can you identify the handwriting on this document that is not in your handwriting?

A I think I can identify what is not my handwriting.

Q Well, do you know whose handwriting it is if it's not your handwriting?

A No.

Q You have no idea?

A I am not too sure.

Q The handwriting that isnot your handwriting you have no idea whatsoever whose handwriting it is?

A It looks to me as though there were two or three handwritings on there.

Q And you can't identify any of them?

A I can identify my own.

Q Mr. Hirsch, the typed form thatyou have in front of you, New York Stock Exchange Exhibit Q, did you read that before you signed it?

A I beg your pardon?

Q Did you read the typed form after it was completed? NewYork Stock Exchange Exhibit Q, did you read the entire document before you signed it?

A I believe so.

Q Do you know of any statements in this document, Mr. Hirsch, New York Stock Exchange Exhibit Q, which are inaccurate?

A I couldn't point them out at this time.

Q I draw your attention to the box on page 4 of the agreement which is labeled "Important."

A Yes.

Q Mr. Hirsch, the second sentence of it reads:

"I have made an investigation of such member organization and its partners, officers, directors and stockholders as I deemed necessary and appropriate under the circumstances, including an examination of the latest certified audit by Haskins & Sells dated September 30, 1969, and a recent computation of net capital prepared by the member organization dated March 31, 1970."

Was that a true statement when you made it, Mr. Hirsch?

A I believed it was true at the time.

MS. LICHSTEIN: I would like to offer Stock Exchange Exhibit Q into evidence.

MR. CAMHY: No objection.

(Defendant New York Stock Exchange Exhibit Q was received in evidence)

Q Just a little bit more, Mr. Hirsch.

How soon after July 2, 1970, did you come to realize that everything wasn't the way you perhaps would have liked it to have been at duPont Glore Forgan?

A Only too soon.

Q A day, a week?

A I can't tell you.

Q Would it be accurate for me to say at least by the fall of 1970 you had some such awareness?

A Oh, yes. Long before.

Q During that period of time did you ever consult an attorney about your feelings about the arrangement that you entered into with duPont Glore Forgan?

A I believe I did.

Q You believe that you did.

Mr. Camhy introduced into evidence previously I believe a letter dated December 3, 1970 from yourself to duPont Glore Forgan indicating that you intended to withdraw as a limited partner of duPont Glore Forgan.

Do you recall having sentand signed that letter?

A Yes.

Q And would it be correct for me to say that subsequently you entered into a subordination agreement with duPont Glore Forgan, is that correct?

A Yes.

Q And pursuant to that subordination agreement

you received $100,000 in payment from duPont Glore Forgan, is that correct?

A Yes.

MS. LICHSTEIN: I have no further questions.

THE WITNESS: Did you say subsequent to the -- was the word subsequent to my signing?

MS. LICHSTEIN: Subsequent to your signing the subordination agreement you received $100,000?

THE WITNESS: That was the word you used. Yes.

MS. LICHSTEIN: Okay.

CROSS-EXAMINATION

BY MR. HYDE:

Q Mr. Hirsch, you were aware in 1970, were you not, that member firms of the New York Stock Exchange broker-dealers registered with the Securities and Exchange Commission were required to file answers to financial questionnaire audited by independent outside brokers?

A I did, yes.

Q Were you aware that they were also required to file a computation of the net capital for purposes of rule 325 of the New York Stock Exchange?

A I believe so.

Q Were you also aware of the fact that in

connection with the annual surprise audit the auditors were required to file a report with respect to any material inadequacies they might encounter in the firms accounting system internal accounting control and procedures for safeguarding securities?

A Yes.

Q You were aware, were you not, in the spring of 1970 at the time of the merger negotiations with duPont that duPont was having capital difficulties?

A Yes.

Q In other words, you knew that they needed more capital, did you not?

A Yes.

Q And I believe you testified that you knew at that time that they had a capital deficiency within the preceding year, did you not?

A I believe shortly before our entry.

Q Entry into the merger?

A Into the merger.

Q That fact was brought to your attention, to the best of your recollection?

A I believe that was the only one I was familiar with that I knew at that time.

Q When you say the only one, what do you mean?

A Pardon me?

Q I am sorry, I didn't understand the meaning of what you said.

A Well, I didn't know -- probably the answer is yes to what you said.

Q To the best of your recollection prior to the merger you knew that duPont had had a net capital deficiency within the preceding year?

A Yes. A net capital deficiency? I don't know what the term net capital deficiency means. You mean --

Q They were in deficit of the minimum required by the New York Stock Exchange pursuant to rule 325?

A Yes.

MR. CAMHY: I object, your Honor. Would somebody take pains to explain this to him in terms of violation of the rule and not this legal language which is being sent to him?

MR. HYDE: Yes, let me do that.

Q Mr. Hirsch, do you recall being shown by me on your deposition a copy of an exhibit which has been marked here as Plaintiffs' Exhibt 109, the memorandum computing net capital, being asked the question, "Mr. Hirsch, if I might direct your attention to the second

page of Haskins & Sells Exhibit 4,"

Now, Plaintiffs' Exhibit 109,"particularly the line reading 'Net capital and deficit of minimum required by New York Stock Exchange pursuant to rule 325,' the figure appearing there, $6,827,000, and ask you if that figure was known to you prior to your entry into the merger between Hirsch and Francis I. duPont.

"A I don't know if that figure was known to me but I knew that they were in need of capital.

"Q Did you know that at some time, at some point in time prior to the merger between Hirsch and duPont, duPont had been in deficit?

"A Would you say --

"Q Under the net capital requirements of the New York Stock Exchange?

"A I believe so."

Does that refresh your recollection that you knew duPont had been in deficit under the requirements of the New York Stock Exchange?

A Under the then existing requirements, yes.

MR. CAMHY: May I hear the answer, please.

A Which were variable.

THE COURT: Of the then existing requirements.

Q Were you also aware prior to the merger, Mr.

Hirsch, that duPont had back office problems?

A Yes.

Q From whom did you learn --

THE COURT: Mr. Hyde, he has testified about that. Miss Lichstein brought that out. Why do we have to go over this again?

MR. HYDE: Your Honor, I want to find out from whom he learned that.

Q From whom did you learn that duPont had back office problems?

A I believe from my partners.

Q Anyone else?

A Possibly.

Q Possibly whom?

A Possibly from other sources, but I don't recall which.

T2b

Q Do you recall being asked at your deposition at page 24:

"Q Who reported to you about the existence of the back office problem at Francis I. duPont & Co.?

"A Essentially my partners and Haskins & Sells."

Do you recall giving that testimony at your deposition?

A I don't recall Haskins & Sells reported it to me. I think it must have been from one of the documents perhaps that you referred to.

Q In any event you were aware of the fact?

A Yes.

MR. HYDE: I have no further questions.

MR. POLLACK: No questions, your Honor.

REDIRECT EXAMINATION

BY MR. CAMHY:

Q Mr. Hirsch, the date of the merger was July 2, 1970. I thought I heard you say on cross-examination when you were asked when did you first become aware that you had not gotten a good deal, that you had gotten into something bad and you were asked whether you were aware of it in July of 1970 I thought I heard you say long before that.

A No.

THE COURT: No, the question was by the fall,

he said by that time.

MR. CAMHY: By the fall.

THE COURT: Yes.

MR. CAMHY: Excuse me. Thank you.

A I think my first answer was not long thereafter.

THE COURT: Yes.

Q Mr. Hirsch, at what point in time in relation to your negotiations did you become aware that --

MR. CAMHY: Strike that.

Q I have heard you testify that duPont was in need of capital and was in capital deficiency. Can you fix the time that you understood that it had been in capital deficiency?

A I think it was a brief time, before or during our negotiations.

Q And did you understand that it had been corrected?

A I understood it had been corrected.

Q Were you of the belief that the deficiency was substantial in terms of the size of the duPont firm?

THE COURT: He already testified to that. I understand his testimony on that point.

MR. CAMHY: Thank you.

Q Mr. Hirsch, had you ever been made aware of the fact that duPont had satisfied capital deficiencies of

approximately six million dollars the previous December by selling securities out of long difference accounts?

MS. LICHTSTEIN: I object, your Honor, it is beyond the scope of cross-examination.

MR. HYDE: It was asked on the direct, your Honor.

MR. CAMHY: I thought I had missed it. If I did I withdraw it.

THE COURT: I don't see any need for that kind of question anyway.

MR. CAMHY: Thank you.

THE COURT: Is that all?

MR. CAMHY: I have nothing further, your Honor.

MS. LICHTSTEIN: I have no further questions, your Honor.

THE COURT: All right. Thank you very much Mr. Hirsch, you may step down.

(Witness excused)

MR. CAMHY: May I have Mr. Lill for just three or four questions.

MR. HYDE: Your Honor, may I inquire of counsel as to the purpose of recalling Mr. Lill?

MR. CAMHY: To question him on certain auditing standards in connection with the issuance of his opinion which he beliebed to be applicable to himself at the time he performed

his services.

MR. HYDE: I don't know if this raises any issue that could not have been explored in the first instance.

THE COURT: Auditing standards? All right, I think I will allow it in order to find out what you have on your mind.

E D W A R D J. L I L L, recalled.

BY MR. CAMBY:

Q Mr. Lill, have you ever heard it said that Rule 325 ratio is directly concerned with going concern value of the firm?

A Directly concerned? No, sir.

Q Or that it affects going concern value?

A It could if certain people take action with respect to a Rule 325 violation. There have been firms in and out of capital violation frequently that continue in business. So that by itself does not affect going concern.

Q Have you ever heard the proposition stated that a violation of the applicable net capital rules as of the audit date requires footnote disclosure and may require the independent public accountant to qualify his opinion because of going concern considerations?

A Yes, sir.

Q Did you consider that principle applicable to you at that time?

A We considered the principle and that is why we put the attachments on the Rule 325 computation.

Q Secondly, the sentence "However, there may be situations in which the capital deficiency is corrected prior to the issuance of the independent public accountant's report. In these circumstances footnote disclosure may be adequate."

A Yes, sir. I am familiar with that.

Q Do you consider that a standard that applied to you at the time?

A That is why the -- yes, that is why the capital computation was filed with the questionnaire. The questionnair has as an integral part now during this period of time the entire capital computation. At the time that audit guide was written, and I might mention I was part author of the guide. My name is on the front and at the time that was written a 325 computation was not known to be applicable or known to be a requirement. That has been in edit form for seven years, sir.

Q Are you saying that the principles in this book were applicable at the time you did this audit?

A Yes. The disclosure requirements were required

and a disclosure in the form of a Rule 325 computation in its entirety was considered more adequate than just a footnote.

Q Yes, but Mr. Lill, the computation in its entirety doesn't go to the public.

A The questionnaire and the 325 as filed with the regulators and it is available to the public, sir.

Q Mr. Lill, you testified that you did not know of your own knowledge whether or not it was available to the public.

A The questionnaire is available to the public. The Rule 325 that was filed was not filed as a confidential document.

Q Well, are you saying that this Rule 325 was available in Washington, D.C.?

A Or in the regional office.

Q Didn't you testify that the only reason you sent it was because you got some kind of a memorandum, request or a call from the SEC to send one down after you had sent the questionnaire?

A It had become a requirement, a verbal requirement and I believe my testimony stated that it was during '69 that that requirement came into being.

Q How many copies did you send?

A I believe we filed two copies with the regional office. I would have to check the transmittal letters.

Q And that would be the place where somebody would have to find them, is that correct?

A That is where they have to avail themselves of the documents, yes.

Q But they wouldn't see a footnote to your opinion in any way?

A A footnote to our opinion?

Q That's right.

A A footnote to the financial statement?

Q That's right.

A No, sir. Not necessarily.

MR. CAMHY: Your Honor, if I may I would like to mark the book, just a page and the paragraph, only that paragraph --

THE WITNESS: I think the paragraph has to be read in the entire context of the disclosure.

Q Well, you tell me how much you think is appropriate, Mr. Lill (handing).

A I would think that entire portion (indicating).

Q All right, why don't we just put a--

A Because the substance of the paragraph addresses itself to the answers to the financial questionnaire and

all of the information that goes with it.

MR. CAMHY: Your Honor, I offer as plaintiffs' next numbered exhibit --

THE CLERK: 263.

MR. CAMHY: -- 263 a page of a book entitled Industry Audit Guide, Audits of Brokers and Dealers in Securities, prepared by the Committee on Stock Brokerage Auditing.

THE COURT: What is the number of the page?

MR. CAMHY: The page is page 104. And let the record indicate that there were several prominent editors among one of which was Mr. Edward J. Ill.

MR. HYDE: No objection.

MR. BROOKS: No objection.

xx (Plaintiffs' Exhibit 263 received in evidence.)

MR. BROOKS: May I ask if this is offered against the New York Stock Exchange?

MR. CAMHY: No, it is only offered as against Haskins & Sells.

BY MR. CAMHY:

Q Now you testified that you believe you met the substance of the applicable standard by adding the proof of the additional capital that came in, is that correct?

A By adding the disclosure of the information, sir.

Q Would you have issued a clean opinion, that is the opinion that went on the public balance sheet that went to the public, would you have issued that opinion if that capital had not come in?

A I would have considered all of the attending circumstances but I did not face the question at the time.

Q Well, my question is if that capital had not been received would you have issued the opinion?

A Probably not, although it is very difficult to answer because I would have then had the obligation to go further into the discovery of this going concern question.

Q And did you consider it your job and your professional obligation to satisfy yourself that the capital did come in and not merely being told that it had come in?

A Yes. As a matter of fact I believe a letter report was issued to that extent.

Q If subsequent to your opinion you had found out that you had been misinformed and that the capital had not come in from those sources would you have under your concept of your professional obligations withdrawn your opinion?

THE COURT: What is the basis of -- there is no basis for that question at all.

MR. CAMHY: Your Honor, I am stating it hypothetically so I can then proceed to another set of facts which I am sure

the witness can handle himself.

THE COURT: There is no foundation for that question.

Q If subsequent to the issuance of your -- are you aware of a rule which says that if subsequent to the issuance of your opinion you find a fact as at the audit date which you did not know and which materially affects your opinion you are required to withdraw your opinion, or you should consider withdrawing your opinion?

A If I learn something subsequent to my opinion --

Q Yes.

A -- and as the literature reads I do not have an obligation to search for it but I do learn something subsequent to my opinion that would make the financial statements as of the audit date materially misleading I would then have to consider my opinion. And in this case I learned of nothing that made the financial statements as of the audit date misleading. As a matter of fact the information in the financial statement has not been challenged at all and I to this day don't know that there was anything misleading in that financial statement.

Q I gather you feel that the going concern value inherent in either being in or out of violation of 325 does not impact the public financial statement?

A When you say the public financial statement--

Q The financial statement.

A There was no assertion that came to my attention that the firm had a capital violation as of the audit date which had not been corrected as of the opinion date.

Q Is that your testimony?

A Yes, sir.

Q Thank you. I have nothing further.

A As a matter of fact, in the initial examination I believe you and I got into a discussion as to whether that 8.1 million was an additional charge as of the audit date.

Q That's right.

A And it was my belief that it was not as of the audit date.

Q I remember very well.

A And there is full recognition that the stock exchange makes several computations none of which were considered official.

Q I think we both recall that you said it was not as at the audit date and I tried to suggest that it was.

A Yes.

MR. CAMHY: Thank you, nothing further.

THE COURT: All right, we will take a ten-minute recess.

(Recess)

MR. HYDE: I have no questions, your Honor.

MR. CAMHY: I have nothing further of the witness.

THE COURT: All right.

MR. BROOKS: No questions of Mr. Lill.

(Witness excused)

MR. CAMHY: Two further matters, your Honor. One, we have produced evidence that the Perot group in control of the successor company and the partnership of the then company and corporation disclaim this obligation. I would like to make a short statement based on my own knowledge of what followed that in respect of litigation in the state court and then if counsel feels that statement is incompetent or inappropriate maybe there is some other way I have to prove it but if they have no objection to it we could save a lot of time. May I make that statement?

THE COURT: Well, it would appear to me that we would all save a lot of time if you can make such a statement if you would write out and have it agreed to and filed, make it a part of the record.

MR. CAMHY: I would be most glad to try that, your Honor, but I couldn't do it this afternoon. I assume I have the court's permission to do so after I rest. The only other item is something I brought up yesterday, your Honor, and that has to do with certain testimony. I will not

call an expert accountant. The only problem I see in respect of expert testimony is if the court rules certain ways on the question of damages it may be I will need an expert witness on the issue of damages and damages only. As I understand the case I feel I don't need such a witness. And the court hasn't ruled yet on liability. I suggest that if the court does rule on liability and then feels that there is a missing piece in damages for lack of an expert witness I would be prepared to call him. If the court wants that done now I request that I be given until next week to do so.

THE COURT: Well, I think -- let me put it this way: I think I have indicated to all counsel that I wanted this matter, any proof that you have in this case, I am not going to have any of it hanging around anywhere, I want all the proof that is supposed to be put in by everybody that they think they will need. It does appear to me that I can't advise you on the question of damages. It does appear to me that if you think that testimony can be done next week, and since we are now at the point of liability, it is agreeable to me in any event.

MR. CAMHY: That I produce an expert next week.

THE COURT: If you feel it is necessary. I can't tell you to produce him or not produce him. If you feel that

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on the question of damages it is necessary then you can do that next week.

MR. CAMHY: Thank you, your Honor. With that understanding I rest.

THE COURT: All right. Well, there are two matters open, and aside from that you rest. All right. Gentlemen, what is the problem?

MR. POLLACK: Your Honor, there seems to be some uncertainty among counsel in this respect: I had asked Mr. Brooks and Mr. Hyde since I understood that they were not planning to offer evidence on the cross claims whether I might address myself to the court on motions specifically and only to the cross claims first before they made their motions. However, I take it from their hesitancy that the reason for it is that they plan to make their motions before they rest, and if that is so I would defer to them on their motions. I would ask that if possible we be heard today on our motions with respect to the cross claims.

THE COURT: All right, I will hear the motions. And I am going to suggest that you make your motions for the record. This is a time when I frankly wish we had the British system because as a matter of fact it would appear to me that I would be in a better position to give my impressions of this case to make a decision now. I think you

had better make your motions then I will tell you my thinking.

MR. POLLACK: If your Honor pleases, may I raise the possibility of a decision now to be followed by briefing and--

THE COURT: Well, I will have to find out, as far as you are concerned I have to find out from the defendants whether they are going to introduce any evidence. If they are not going to introduce any evidence and it appears to me that clearly no case as far as I know has as yet been made--

MR. POLLACK: I agree and it is my understanding--

THE COURT: And if they are not going to present any evidence and make that representation then I am prepared pursuant to any motion that you make, to rule on that motion.

MR. POLLACK: It is my understanding that they are not going to --

THE COURT: Well, let me hear it from the horse's mouth.

MR. BROOKS: We plan to introduce no evidence that would relate to the cross claims against Mr. Pollack's clients.

THE COURT: All right.

MR. HYDE: We rest on the plaintiffs' case in that respect, your Honor. Our position is that no case has been made out either by the plaintiff or by ourselves which would

justify judgment on the cross claims. If however, your Honor feels that the plaintiff has made out a case against Haskins & Sells our position is that that same record and those same findings would give rise to liability for contribution with respect to the cross claims.

THE COURT: Well, I don't agree with that. I don't agree with that position at all.

MR. HYDE: That is our position, your Honor.

THE COURT: And I --

MR. HYDE: Our position if I may sharpen it slightly, your Honor, is this: The evidence in the case presented by the plaintiff, of course at this stage it is hard because we haven't heard just what the plaintiff contends, but apparently he is contending that there were certain misrepresentations and omissions made to him in connection -- made to them in connection with the merger. Our position is that if there were to be any liability imposed upon the accountants for these alleged misrepresentations and omissions the partnership and the individual partners who have been named here would be the ones who would be primarily responsible for the disclosure and for the omissions. And in that situation the accountants would be entitled under the cases, which I am prepared to brief to your Honor, for a contribution from those other parties.

THE COURT: All right. It is my view, and I doubt that it is going to be changed, that the plaintiffs' case against Haskins & Sells is something entirely apart from Haskins & Sells cross claims against these defendants.

MR. HYDE: I don't believe it is, your Honor. I think it is one and the same case.

THE COURT: All right, I heard your statement Mr. Hyde, and I would appreciate your allowing me to finish.

MR. HYDE: I'm sorry, your Honor.

THE COURT: As I understand the plaintiffs' claim the plaintiff is claiming that certain information which the accountants knew was not disclosed and that somehow there is a duty to disclose. There is no claim that the firm, the F.I. duPont firm gave the accountants any misinformation or gave the plaintiffs any misinformation. As a matter of fact thetestimony is that they gave them everything--or withheld any information. The testimony is that the plaintiffs received everything they asked for and they have presented no evidence indicating that they have any claim on misinformation. Therefore as far as the plaintiffs' case is concerned to that extent I think it is different, and from yours, from the plaintiffs' case against you. So that I can't accept the fact that if you rest on the evidence as it is presented today in regard to that and you intend to

present no evidence of any withholding on the part of the partnership then I am prepared to dismiss the cross claim against the defendants certainly insofar as the New York Stock Exchange is concerned it concedes that it has no case and so it is dismissed as to the cross claim. But the reason I am making this statement is I just don't want you to misunderstand my views on the matter. I don't accept your view of the case.

MR. HYDE: I won't prolong the argument, your Honor. I believe I have made my position clear and I think that the cases would support our position that if there was a duty on Haskins & Sells to disclose financials of the firm such as the fact that the firm was in deficit of its net capital in September of 1969, if there was a duty upon us to disclose the fact that something improper occurred with respect to the liquidation of the longs, that that duty also by operation of law without any additional evidence rested upon the firm and the individual partners and that we would be entitled in that situation under the authorities to a contribution.

THE COURT: All right.

MR. POLLACK: Your Honor, our position will be and is that there is not a scintilla of evidence that the firm or Mr. Speicher or either of them was a tort feasor much

less a joint tort feasor and that in view of the fact that Mr. Hyde has said he will adduce no evidence on his cross claims other than as has been offered by the plaintiffs and that Mr. Brooks has conceded that they will not do so either I respectfully move for the dismissal of all cross claims against Milton A. Speicher, against Francis I. duPont & Co. and against F.I. duPont Glore Forgan & Co.

THE COURT: All right, the motion is granted.

MR. POLLACK: Thank you very much, your Honor.

THE COURT: All right now, Mr. Brooks or Mr. Hyde.

MR. HYDE: Your Honor, on behalf of the defendant Haskins & Sells I move at this time to dismiss all of the complaint pursuant to Rule 41-B of the Civil Rules. I am prepared to argue the point if your Honor wishes to hear argument.

THE COURT: Not really. I think I merely wanted your motion on the record to protect the record.

MR. BROOKS: Your Honor, on behalf of defendant New York Stock Exchange I move under Rule 41-B to dismiss the case of all plaintiffs against the exchange on the ground that on the facts and the law plaintiffs are entitled to no relief against the exchange.

THE COURT: Well, I will tell you gentlemen my view

on the matter. I have serious doubt that I am going to change my present impression of the record insofar as the New York Stock Exchange is concerned. I don't believe that what I have heard in the testimony yet that any case has been made against the New York Stock Exchange. I think however Mr. Brooks, since your case is only going to be 45 minutes and since this case is going to be appealed that out of prudence for all parties to save our being here at some other time that you ought to put on your case nonetheless. Insofar as the Haskins & Sells, I am not as clear in my mind that no case has been made. Frankly my impression is, perhaps not, but I don't know, I am not sure what duty or responsibility really that Haskins & Sells owed to the plaintiff. There is some testimony from Mr. Petrillo who actually gave information and which they acted on. As far as the stock exchange is concerned as far as I hear the evidence it is clear that the stock exchange did not give some information they had but then there is no evidence anybody asked for it and there is no evidence so far as I know that at the time that the New York Stock Exchange was in any way obligated or required to. So that I frankly don't have many problems about that. I need some more enlightenment I guess in terms of proof insofar as Haskins & Sells is concerned. It may well be, Mr. Cammy, that when all the briefs

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are in and unhappily I have to restudy this and come down with a decision finally, which is going to be some time in the fall I am sure, but I may change my mind, but I just think it is only fair to everybody to get my impressions.

MR. CAMHY: Your Honor, may I be heard for just one second?

THE COURT: Yes.

MR. CAMHY: You said that the stock exchange had no duty to disclose. This really raises in a way the point that was raised on the 6-B question. And putting it perhaps most artfully and you may think a little artistically or artificially may I say that if 6-B does nothing else I think the duty is to close them down and the violation of that duty was really the duty to disclose. That is to say if they were under a duty to close them down then I go to Rule 10b and say that the rule Rule 10b disclosure duty was violated by the failure of the duty to close them down.

THE COURT: The only thing I can say in terms of the stock exchange, my own view was that it was attempting to take steps to protect the public. I think that's a part of its responsibility, to save the firm, and even the conversations with Mr. Mundheim seemed to me to be perfectly consistent with that view. But you know there is no point in

arguing about that. I am not going to decide it now, and it is not a final judgment but I wouldn't be surprised if that's how it finally comes out.

MR. CAMHY: I understand.

THE COURT: So that what I would like gentlemen, is you have a four-minute case, Mr. Brooks, I would like to hear it.

MR. BROOKS: Your Honor, since I made that statement yesterday I have reviewed the record over the evening and determined that what I spoke of yesterday as a 45-minute case would be cumulative of the testimony of Mr. Chenet, Mr. Arning and the stock exchange therefore rests.

THE COURT: All right, Mr. Hyde.

MR. HYDE: Your Honor, I am not prepared to go forward this afternoon. I ask your Honor's indulgence if we are going to resume on Monday morning --

THE COURT: Well, it won't be Monday morning. I will be in Part 1 so it will be Monday afternoon.

MR. HYDE: All right, it may well be your Honor, that I will rest upon the plaintiffs' case myself but I would like to have an opportunity to consider the reocrds and make my decisions. I could let your Honor know and the other parties know by the end of the week.

THE COURT: All right. And I think that at least by

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the end of the week.

THE COURT: All right, and I think that at least by that time you gentlemen ought to agree upon a proposed schedule entered to post-trial briefs which I am sure all of you will want. Is there anything further? All right, then we will adjourn until 2 o'clock Monday in room 506.

(Adjourned to June 30, 1975, at 2 P.M.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Marshall S. Mundheim (Resumed)	927	950		
Milton A. Speicher (Recalled)	1025			
Howard C. Hirsch	1029	1039	1077	
Edward J. Lill (Recalled	1080			

EXHIBIT INDEX

Plaintiffs	Identification	In Evidence
4, 10		947
11		948
6, 8		1036
13		1038
263		1084
Defendant New York Stock Exchange		
M		973
ZZZ		994
Q		1069

11C:

HOWARD C. HIRSCH, et al.
vs.
HASKINS & SELLS, INC., et al.

June 30, 1975,
2 P.M.

--

THE COURT: Good afternoon, gentlemen.

MR. CAMHY: Your Honor, first as I informed the Court this morning and as I informed counsel to the best of my ability lastweek there will be no expert testimony on behalf of the plaintiff. Secondly, I had indicated to the Court that I wish to place into the record certain facts about the state court litigation and the settlement. I have prepared a written statement along those lines which has been sent to counsel for the defendants. I would like to offer that statement at this time. There are only two things I would like made clear for the record. There were two questions that Mr. Hyde asked me and I would like to make it clear on the record. In paragraph 4 it states, the issues to be arbitrated were, and then there is a list of issues. I think it should be made clear that there never was a claim in arbitration which specified issues as I understood it. We received a demand for arbitration from the Perot group but never went anywhere. When I say here the issues to be arbitrated, what I really mean is the issues

which were developed before Judge Fein and which came out in the motion before him and which he sent to arbitration by saying he couldn't decide. So that I think this should be clarified where it says the issues to be arbitrated, what I really mean is that the issues which were presented to the judge and which he said that he would not decide but would all be handled by by the arbitration. And then secondly, in paragraph 5 I make a statement that I was informed by the attorneys for the Perot group that the duPont Clore Forgan Corporation was not in good financial condition owing to certain things. And I want it made clear that this is being offered as what was told to me. I do not offer it for its truth, although I have no reason to doubt it. But it is offered only as that which was told to me at a settlement conference.

MR. BROOKS: Your Honor, I have some qualms about the Court's receiving this in evidence. I wonder if it is necessary. It seems to me that the only question that Mr. Camhy has yet to button down is the amounts that his clients would be entitled to if they proved liability and such other things as are necessary that they prove. And I think there is no disagreement among the parties as to those amounts. Why do we need counsel's sense of what the issues were in another proceeding? Or what issues were

supposed to be arbitrated which never really reached arbitration so we know what the real issues were or not? Is it really necessary that we take this evidence in this case is my question.

MR. CAMHY: It is being offered, your Honor, only to show that counsel and plaintiffs did a diligent job in terms of attempted mitigation and salvage.

THE COURT: Well, all right, Mr. Brooks, I suppose with that statement I suppose we can proceed. I don't see any point in arguing about this. It is here and I gather that the chief purpose of it is to show what the proceedings were and the amount, if any, that was recovered. Now what else is there? There was something as I recall other than this that was left open in your case which was-- was it just the --

MR. CAMHY: It was the question of possible expert testimony which I am not going to use and this statement.

THE COURT: All right. All right.

MR. CAMHY: Your Honor, I do have one other thing and it wasn't really left open. It is in the nature of corrections we have prepared a whole list of transcript corrections which I don't think we have to deal with today but there is one, it appears at page 99 of the transcript

where I am reading from the testimony of Ed Lill on deposition and the deposition itself contained an error. That was corrected just before trial by Mr. Lill. I read it, Mr. Brooks was not aware of the correction, he interrupted me. As a result the whole thing came out backwards as it had in the transcript before trial. I would therefore like to read into the record at this point that at page 99, line 2, answer should read: "Question" at page 99, line 3, question should read answer, and page 99, line 4, question should read answer. And I represent that this is to conform to the deposition transcript as corrected by Mr. Lill just before the trial.

THE COURT: Well, I am sure we will be able to follow that trail. My feeling would be that it might make more sense for you to read it in properly but all right. All right, Mr. Hyde, what can I do for you?

MR. HYDE: Just one preliminary, your Honor. Plaintiffs' Exhibit 263 which was offered on the testimony of Mr. Lill on Friday, I would like to add to the excerpts which Mr. Camhy supplied last week of a page, which I understand there is no objection, which gives the date of publication as 1973 so we have that as part of the --

MR. CAMHY: No objection.

MR. HYDE: May this be physically added to

Plaintiffs' Exhibit 263 then?

THE COURT: All right.

THE COURT: Anything further?

MR. HYDE: No further preliminaries, your Honor. I am ready to proceed when the preliminaries are over.

THE COURT: I gather, Mr. Brooks, that the New York Stock Exchange rests?

MR. BROOKS: Yes, sir. we did rest.

THE COURT: I know you did rest but what I should say is do you persist in it?

MR. BROOKS: We continue to rest. I may wish to cross-examine as to any other testimony but we have no testimony or evidence to present.

THE COURT: I understand. All right, Mr. Hyde.

MR. MALONEY: Excuse me, your Honor, may I at this time move to dismiss the cross claim against the defendant --

THE COURT: We are not ready for that yet. I am going to allow Mr. Hyde to conclude his case. Let's proceed.

MR. HYDE: Mr. Gariboldi.

F R A N K G A R I B O L D I, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HYDE:

Q Mr. Gariboldi, last week Mr. Weil was called on behalf of the plaintiffs and was being examined with respect to a meeting which he testified occurred some time in the last two or three weeks of June, 1970. He identified Mr. Kohns, Mr. Mundheim, Mr. Hirsch, and he believed Mr. Framen, yourself and Mr. Petrillo of Haskins & Sells as being the parties present. He was then asked by Mr. Camhy, did the subject of differences come up, and he answered, yes, they did. A comment was passed by Mr. Gariboldi to Mr. Petrillo stating the amount of differences that he had discovered on this form as we were reading it together, and the comment was passed that, you get rather excited and there is nothing to worry about. That was passed by Mr. Petrillo to Mr. Gariboldi. Now, Mr. Gariboldi I would like to ask you whether to the best of your recollection you recall at that meeting in June, 1970, or any other meeting which occurred at which Mr. Petrillo was present his making any comment to the effect that the securities differences of duPont were nothing to worry about, or any words to that effect.

A No.

MR. HYDE: No further questions.

BY MR. CAMHY:

T2 Q Is it your testimony you just do not -- strike that

You do not remember him making such a statement to you?

A Mr. Brooks, if I understood Mr. Brooks' question, he said to the best of myrecollection, and my answer was no.

Mr. Brooks said to the best of my recollection and I said no to Mr. Brooks.

THE COURT: You mean Mr. Hyde?

THE WITNESS: I'm sorry, to Mr. Hyde.

Q To the best of your recollection, no such statement was made to you?

A Not to me.

MR. CAMHY: I think I have nothing.

THE COURT: You have nothing further?

MR. CAMHY:Well, your Honor, just two questions but I think it is in the record.

BY MR. CAMHY:

Q You were with Haskins before you went to Hirsch, isn't that correct?

A That's correct.

Q Was Haskins in any way involved in connection with your getting your present position?

A I testified to that, that I was a senior on the job and Mr. Petrillo had made arrangements for me to speak

to Mr. Cox.

Q No, I mean the present position you have now.

A Now?

Q Yes.

A No, no.

Q Did you speak to Mr. Hyde between last week and the present time about this case?

A Yes.

MR. CAMHY: That is all I have, your Honor.

THE COURT: All right. Thank you, Mr. Gariboldi.

(Witness excused)

THE COURT: All right, Mr. Hyde.

MR. HYDE: I have no further testimony, your Honor. One other matter I overlooked.

In the motion for summary judgment that was made and decided by your Honor, there were a couple of items included among the exhibits.

I have specifically in mind the partnership agreement, the printed articles, and also the addendum which sets forth the various participations of the plaintiff.

In reviewing the case, it occurred to me that these exhibits may be relevant on the issue of damages in this case and I would like to be sure that they are part of the record.

gth

If it is all right, I would just have it agreed that they would be deemed part of the record rather than have additional exhibits marked. They are already part of the court record.

THE COURT: Are they the exhibits that were part of the motion for summary judgment?

MR. HYDE: Yes. And your Honor alluded to them, in his opinion.

THE COURT: Have you defined them so we will know precisely what they are?

MR. HYDE: Let me do that, your Honor.

THE COURT: The agreement was 1.

MR. HYDE: The merger agreement is Plaintiffs' Exhibit 1.

The next one I have in mind was marked as Exhibit 3 to my affidavit, which is dated--

THE COURT: That is all right. All we need is for you to describe it so we will know what it is, Mr. Hyde.

MR. HYDE: It is an agreement made as of July 2nd, 1970, between the various parties who were apparently becoming partners of the merged firm, F.I. duPont Glore Forgan.

The other item, which is attached to Mr. Camhy's

affidavit, is the printed document which is entitled "Articles of limited partnership."

THE COURT: I see.

MR. HYDE: I think your Honor also referred to that in his opinion.

MR. CAMHY: No objection, your Honor.

MR. HYDE: I can't seem to locate it immediately.

THE COURT: I know what you are talking about. That is all I wanted to find out.

MR HYDE: I just wanted to make sure that they would be considered part of the record.

With that, your Honor, Haskins & Sells rests.

THE COURT: Anything further?

MR. CAMHY: Your Honor, I would like to recall Mr. Weil only to establish two things going to credibility.

Mr. Weil.

T H O M A S L. W E I L, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CAMHY:

Q Mr. Weil, you gave substantially the same testimony about that meeting at your deposition, did you not?

A Yes.

Q Prior to that deposition, did you ever communicate with me about that meeting or with any of the plaintiffs?

A No.

Q And was the first time you ever uttered anything that meeting at the deposition which was taken by, I believe, Mr. Hyde?

A Yes.

Q And since that deposition, did I ever speak to you about that meeting?

A No.

MR. CAMHY: Thank you, your Honor.

Q Oh, one other thing.

Have you ever worked for Haskins & Sells?

A No.

MR. CAMHY: Thank you. That is all, your Honor.

THE COURT: Wait a minute. Mr. Hyde, do you have any questions?

MR. HYDE: I have no questions, your Honor.

THE COURT: Thank you, Mr. Weil.

(Witness excused.)

THE COURT: Is there anything further?

MR. CAMHY: No, your Honor.

THE COURT: All right. Now I will hear from you, Mr. Maloney.

MR. MALONEY: I would move that all cross claims be dismissed against the defendant Latour.

THE COURT: All right.

MR. HYDE: Your Honor, I oppose the motion for the same reasons I set forth the other day in my opposition to the motion made by Mr. Pollack on behalf of his client.

THE COURT: This is the first time that I realized that you were opposing the motion. You were sort of ambivalent last Wednesday but now you are in direct opposition to it. Is that correct?

MR. HYDE: I am sorry, your Honor?

THE COURT: I say, your position was somewhat ambiguous last week, now you are in opposition, is that correct?

MR. HYDE: I am in opposition to dismissal.

When your Honor says that my reasons last week were ambiguous, I would agree.

My position is that no case has been made out by the plaintiffs which would justify relief against anybody, but if your Honor were to disagree and find a case had been made out against Haskins & Sells on those facts, I submit that we would be entitled to judgment for contribution on the various cross claims. That is still my position, your Honor.

I meant to convey the thought that my position on this gentlemen's cross claims are the same as it was on the other cross claims.

THE COURT: Mr. Brooks, do you have a cross claim against these people?

MR. BROOKS: Yes, I do, your Honor.

I think for the record I opposed the cross claim-- I opposed dismissal of the cross claim, but as with Mr. Pollack, I have nothing to say against the motion that would make a rational decision which would be helpful to your Honor.

THE COURT: I will think about it. I will consider it, Mr. Maloney.

Have you gentlemen agreed upon a schedule for post-trial memoranda?

Do you want to file post-trial memoranda or do you want me to proceed?

MR. CAMHY: Very definitely, your Honor.

Your Honor, I would find it convenient -- and this is only me -- but I would find convenient either a very quick schedule or a long schedule, that is to say, something within the next two weeks or something which gives me until about September 1st or September 10th.

THE COURT: I understand those reasons.

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MR. CAMHY: I would like also that there be reply briefs.

THE COURT: It seems to me that I am going to set a time. You have the transcript before you. I will set a time for all parties to file a brief.

They will file their initial briefs at the same time and I will allow you time to respond.

MR. CAMHY: Correct.

THE COURT: Is two weeks agreeable? Is two weeks agreeable to you, Mr. Brooks?

MR. BROOKS: Two weeks from today?

THE COURT: Yes.

MR. BROOKS: I would have proposed Mr. Camhy's second alternative of a longer time in view of the fact that your Honor said you won't be able to consider the case until the fall.

THE COURT: If I get the briefs earlier, maybe I would.

It is up to you, actually. It really does not matter to me, other than the fact I always would like to handle these things while I still have some impression of what the testimony is. But really it is your convenience and I don't much care and I think if you feel you can do a better job to help me out in the fall, then that is fine.

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MR. BROOKS: I would propose September 10th for an exchange and filing of simultaneous briefs and September 20th with an exchange and filing of simultaneous reply briefs.

THE COURT: Is that agreeable with you, Mr. Hyde?

MR. HYDE: Could I confer with Mr. Brooks for a minute, your Honor?

THE COURT: Why don't the three of you confer.

MR. CAMHY: I have no objection to that schedule, your Honor.

(Pause)

MR. HYDE: Your Honor, I am agreeable to the dates Mr. Brooks has proposed.

THE COURT: All right. The brief in chief will be filed on September 10th and replies filed on September 20th.

All right.

Mr. Maloney, I don't think there is anything for you to do. I will make that decision about the cross claims either then or before, but I am not sure.

MR. MALONEY: Might I make one point, your Honor?

I don't understand that at any time during this case anyone ever claimed that Mr. Latour was acting beyond his scope of his authority as a partner of the firm.

I am greatly confused that the Court is reserving

gth

decision on my motion while the motion was granted as to the partnership.

THE COURT: Because of the fact that I don't know. It was because of the fact that they were there and I had some kind of sense of their participation.

As a matter of fact, I don't even recall at this point who Mr. Labour is. I was kept apprised of who the other parties were because their counsel were there all the time. So I am going to have to get in my own mind some familiarity with it.

All right.

MR. CAMHY: Your Honor, may I just bring up one other thing?

THE COURT: If this is all we do, we could have stayed until 5:30 to finish up the other day.

Yes, Mr. Camhy, what can I do with you?

MR. CAMHY: It has to do with a letter Mr. Hyde sent concerning Mr. Petrillo's absence.

If that letter does not form part of your Honor's judgment, I suppose there is nothing for me to say. I feel --

THE COURT: I haven't seen it.

MR. CAMHY: Mr. Hyde sent a letter saying that he had wanted to call Mr. Petrillo -- I think the letter

speaks for itself better-- but for certain reasons Mr. Petrillo couldn't be here.

I just felt from what I had heard about where Mr. Petrillo is and why, it seemed to be less than the complete story and I just don't know how to respond to something like that.

First, I am not so sure that anything other than the fact that he is not here is even relevant, but if it is relevant, then to put down half the reason in some summary fashion and not the whole reasons perhaps is not fair to the record, either.

As I understand it, Mr. Hyde said that Mr. Petrillo is in Great Britain now and he called him to see if he could get him back and Mr. Petrillo said there had been some accident in the family.

I have received information -- I may be wrong-- Mr. Petrillo recently remarried and he left on a honeymoon.

MR. HYDE: He had an older daughter with children who lived in Kent and he advised me she, his married daughter, was in an accident and he wanted to stay there with her.

I made the statement only to possibly avoid the possibility of some inference which might be drawn from Mr. Petrillo's absence.

gth

He is a fully retired partner of Haskins & Sells. He is not within the control of Haskins & Sells. He is beyond the subpoena power of this court.

Mr. Camhy didn't see fit to depose him pre-trial and there is no pre-trial deposition of Mr. Petrillo and, accordingly, there is nothing that could be done.

MR. CAMHY: Can we have it clear that he resides in New Jersey and he recently traveled there on some honeymoon?

MR. HYDE: He was married before the trial commenced, your Honor. I should say he was widowed approximately a year ago and he was remarried before, just prior to the commencement of the trial.

THE COURT: I don't think there is very much or anything else we can do.

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

HOWARD C. HIRSCH, et al.,

Plaintiffs-Appellants,

- against -

EDMOND duPONT, et al.,
Defendants,
and
HASKINS & SELLS, et al.,
Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,

That on the 8th *day of* **November** *19* **76** *at* **1. 80 Pine St. New York, N.Y.**
2. One Chase Manhattan Plaza N.Y.C.

deponent served the annexed appendix (volumes 1-7) *upon*

1. David Hyde of Cahill, Gordon & Reindel 2. Russell Brooks of Milbank, Tweed, Hadley & McCloy

the **attorneys** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 8th
day of **November** *19* **76**

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Kevin E. Thomas

Print name beneath signature

KEVIN E. THOMAS